A DIGEST OF ENGLISH CIVIL LAW.

EDITOR:
EDWARD JENKS.

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FAMILY LAW. SUCCESSION

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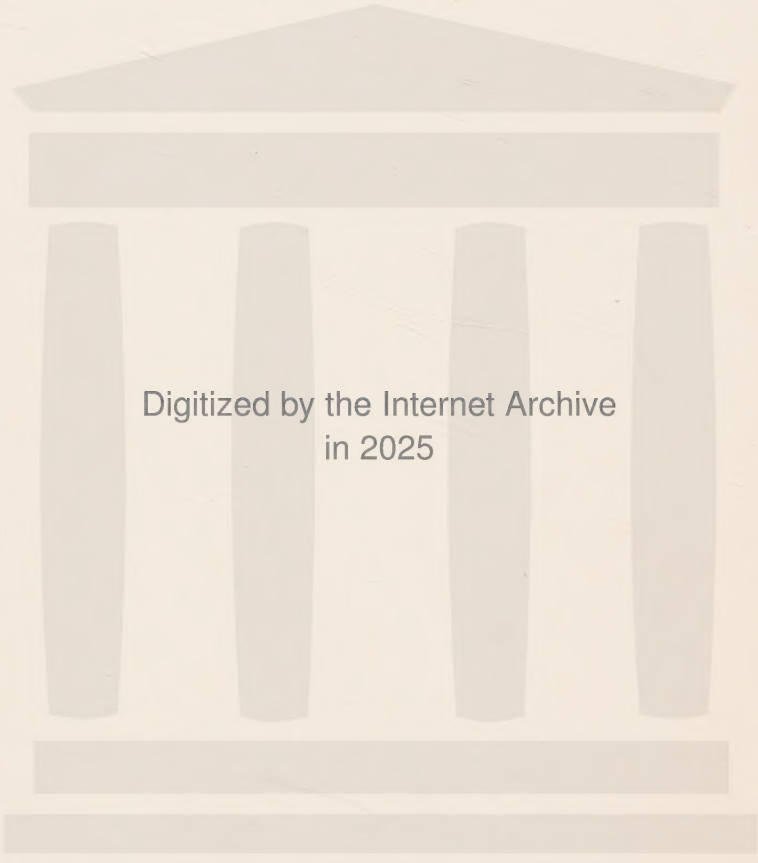
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A DIGEST

OF

ENGLISH CIVIL LAW

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BOOK IV

FAMILY LAW

BY

W. M. GELDART

BOOK V

SUCCESSION

BY

W. S. HOLDSWORTH

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PREFACE

SINCE the Preface to the preceding volume of this work was written, events have occurred which, had the work been in an earlier stage, might well have proved fatal to its continuance. Inasmuch, however, as substantial progress with the next instalment had been made before the outbreak of war, it has seemed to the authors and publishers that it would be desirable to complete, as quickly as circumstances will permit, a task which has been so long in hand. The present volume accordingly contains by far the larger part of the remainder of the work, leaving only a comparatively short final instalment, which it is hoped to publish in the course of next year.

The Editor ventured to express in the Preface to the preceding volume, the belief that Family Law (Book IV) would prove to be very short; and that forecast has been justified by events. For reasons suggested in that Preface, the rules of English Civil Law which deal directly with family relationship are few in number, and of these a considerable part might, in strictness, be classed rather under Public than Private Law. Nevertheless, the rules affecting marriage and its consequences are so important from the standpoint of the private citizen, that the full and careful statement of them furnished by Professor Geldart will probably be found very useful.

On the other hand, the English Law of Succession, which, in a sense, may be said to be an extension of Family Law, is remarkably comprehensive and detailed;

and the Editor's hope that it might be possible to include it, with Family Law, in a single volume, has not been realized. In this volume, accordingly, Dr. Holdsworth deals only with Testamentary Succession; leaving Intestate Succession and the Distribution of Assets to be dealt with in the final volume, which, it is hoped, will also contain a General Index to the whole work.

It seems right to add that, owing to his appointment in the autumn of last year to the position of Dean of the Faculty of Law in the McGill University of Montreal, Professor Lee has not been able to take any direct part in the preparation of this volume, and that, owing to his preoccupation with war work, Professor Geldart has been unable personally to correct the proofs of Book IV, though he prepared and discussed with his colleagues that portion of the volume.

September, 1915.

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Woodward *v.* Goulstone (1886) L. R. 11 App. Ca. 469; 56 L. J. (P.) 1; 55 L. T. 790; 35 W. R. 337 1252
Wormald *v.* Neale (1868) 19 L. T. 93 1170
Wright, *Re* [1906] 2 Ch. 288; 75 L. J. (Ch.) 500; 94 L. T. 696; 54 W. R. 515 1278
Wright *v.* Sanderson (1884) 9 P. D. 149; 53 L. J. (P.) 49; 50 L. T. 769; 48 J. P. 180; 32 W. R. 560. C. A. 1238
Wright's Trusts, *Re* (1856) 2 K. & J. 595; 25 L. J. (Ch.) 621; 2 Jur. (N. S.) 465; 4 W. R. 541 1205
Wylie, *Re* [1895] 2 Ch. 116; 64 L. J. (Ch.) 613; 43 W. R. 475; 13 R. 483 1256

Yarrow *v.* Yarrow [1892] P. 92; 61 L. J. (P.) 69; 66 L. T. 383 1187
Yockney *v.* Hansard (1844) 3 Ha. 620; 8 Jur. 822 1275

ERRATA AND CORRIGENDA IN PRECEDING VOLUMES

BOOK I

Page 7, line 21. At end of § 20, add: "But a corporation which is domiciled in England is an English corporation, even though all its members are aliens and even alien enemies (*Continental Tyre Co.* v. *Daimler* [1915] 1 K. B. 893)."

Page 10, line 24. For "1862," read "1908."

BOOK II, PART II

Page 236, line 5. Add, at end of note: "The *del credere* agent only guarantees the solvency of the buyer, not the due performance of the contract (*Gabriel* v. *Churchill* [1914] 3 K. B. 1272).]"

BOOK II, PART III

Page 320, line 25. Add, at end of note: "And it does not apply where the consideration fails on account of the illegality of the contract (*Harse* v. *Pearl Life Assurance Co.* [1904] 1 K. B. 558; *Hughes* v. *Liverpool Friendly Socy.* (1915) XXXI T. L. R. 635).]"

Page 338, note. Strike out from "There is also" to end of note, and substitute: "The proper method of enforcing it appears to be by a summons to stay proceedings (*Smith* v. *Selwyn* [1914] 3 K. B. 98).]"

Page 348, par. 762. Add as note: "[But not to repay

money received (*Leslie* v. *Shiell* [1914] 3 K. B. 607, questioning *Stocks* v. *Wilson* [1913] 2 K. B. 235).]"

Page 394 (foot). Add: "(d) that he has not been guilty of negligence."

"*Pwllbach Colliery Co.* v. *Woodman* [1915] A. C. 634."

Page 539. Add to note on (v): "It will not be attributed if the knowledge was obtained by the plaintiff's agent otherwise than as such (*Wells* v. *Smith* [1914] 3 K. B. 722).]"

BOOK III

Page 661, end of note. Add: "The fact that the second taker may be the issue of a person unborn at the date of the conveyance is immaterial, if such taker must necessarily be the child of a person in existence at such date (*Re Bullock* [1915] 1 Ch. 493, questioning *Re Parks* [1914] 1 Ch. 595).]"

Page 806, par. 1383. The first statement in this par. has now been rendered doubtful by the decision in *Sobey* v. *Sainsbury* [1913] 2 Ch. 513.

Page 830, § 1414. In note to (a), strike out all after "*Manks* v. *Whiteley*," and substitute: "*ubi sup.* was reversed on appeal, *sub nom. Whiteley* v. *Delaney* [1914] A. C. 132. But *Toulmin* v. *Steere* was not directly overruled.]"

Page 863, last two lines. Strike out "a delivery in execution" and substitute: "registration of a suitable writ or order of execution" (See *Ashburton* v. *Nocton* [1915] 1 Ch. 274).

Page 864, par. 1458. Add, as authority: *Ashburton* v. *Nocton* [1915] 1 Ch. 274.

Page 1055, § 1708. Add: "(v) funds received by a

National Insurance Committee for distribution among doctors on the panel (e).

(e) *O'Driscoll* v. *Manchester Insurance Committee* (1914) XXXI T. L. R. 103."

Page 1070, § 1726, n. Strike out at end: "of the death of such person" and substitute: "after the money or property came into the possession or under the control of the settlor."

Page 1076, § 1733. Add (xii): "powers of appointment (*ante*, Sect. VI, Tit. I, § 1474)."

Page 1103, line 28. For "H," read "B."

Page 1143, note to (a). Add: "If the whole fund has been exhausted by the trustee's drawings, the beneficiaries will have no claim (except as ordinary creditors) upon any moneys subsequently paid into the account; unless such moneys have been specially appropriated by the trustee to the trust (*James Roscoe* v. *Winder* [1915] 1 Ch. 62).]"

ibid. note to (b). Add: "The rule has no application to rival claimants on the same fund (*British Red Cross Balkan Fund* [1914] 2 Ch. 419).]"

BOOK IV

FAMILY LAW

SECTION I

MARRIAGE

TITLE I—CELEBRATION OF MARRIAGE

Forms of marriage

1835. A marriage may be celebrated in England:—

(i) according to the rites of the Church of England; *or*

Marriage Act, 1836, s. 1.

[In the case of a marriage according to the rites of the Church of England, it is not necessary that the words of the marriage service should be spoken by the parties, if their consent is sufficiently evidenced; and deaf and dumb persons may show their consent by signs (*Harrod* v. *Harrod* (1854) 1 K. & J. 4).]

(ii) according to the usages of the Society of Friends ('Quakers'); *or*

Marriage Act, 1823, s. 31.
Marriage Act, 1836, s. 2.
10 & 11 Vict. (1847) c. 58.
Marriage (Society of Friends) Act, 1860, s. 1.
Marriage (Society of Friends) Act, 1872, s. 1.

[If both parties are not members of the Society of Friends, the marriage is not valid unless, when notice is given to the Super-

intendent Registrar (*post*, § 1840) a certificate of a registering officer of the Society of Friends is produced, to the effect that the marriage is authorized by the rules of the Society (Act of 1872, s. 1), which are proved by a copy purporting to be signed by the recording clerk for the time being of the Society (Act of 1860, s. 1).]

(iii) according to the usages of the Jews (where both parties are Jews); *or*,

Marriage Act, 1823, s. 31.
Marriage Act, 1836, s. 2.
10 & 11 Vict. (1847) c. 58.

(iv) according to such form and ceremony as the parties may see fit to adopt, provided that each party shall say: "I do solemnly declare, that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D." and ["I call upon these persons here present to witness that] I, A. B., do take thee, C. D., to be my [lawful] wedded wife" (*or* "husband").

Marriage Act, 1836, s. 20.

[The Welsh equivalent of the above words may be used in places where Welsh is commonly used or preferred (Births and Deaths Registration Act, 1837, s. 23; Marriage Act, 1898, s. 14). It does not appear that a translation into any other language would be valid. In the case of a marriage celebrated in the presence of an 'authorized person,' under the Marriage Act, 1898, ss. 5, 6, (*post*, § 1837) the words in square brackets may be omitted.]

Forms of Established Church

1836. A marriage according to the rites of the Church of England must be celebrated by, and in the

presence of, a minister in Holy Orders of the Church of England, and of two or more witnesses.[a] A person (even though in Holy Orders) cannot validly celebrate his own marriage.[b]

(a) Marriage Act, 1823, s. 28.
R. v. *Millis* (1844) 10 Cl. & F. 534.

[The requirement of two witnesses is directory only; and a marriage has been held valid, although two witnesses were not present (*Wing* v. *Taylor* (1861) 30 L. J. (P. M. & A.) 258). In Ireland it has also been held that a marriage between Roman Catholics, by a Roman Catholic priest, though only in the presence of one witness, and though irregular by the law of the Roman Catholic Church, is valid by the common law of England (*Ussher* v. *Ussher* [1912] 2 Ir. R. 445.]

(b) *Beamish* v. *Beamish* (1861) 9 H. L. C. 274.

Forms of other marriages

1837. A marriage not according to the rites of the Church of England, or the usages of the Quakers or Jews, must be celebrated, if in a registered building, in the presence of some Registrar of Births, Deaths, and Marriages, of the district in which such building is situated,[a] or in the presence of an 'authorized person' appointed under the Marriage Act, 1898;[b] if at the office of a Superintendent Registrar of Births, Deaths, and Marriages, in the presence of him and of some Registrar of the district.[c] In each of these cases the presence of two witnesses is also required.[d]

(a) Marriage Act, 1836, s. 20. (A registered building is a place of worship belonging to some religious body other than the Church of England, and duly registered according to law (*ibid.*, s. 18).)
(b) S. 6. (An 'authorized person' is a person duly authorized by the

trustees or other governing body of the building to solemnise the marriage (*ibid.*).)

(c) Marriage Act, 1836, s. 21.

(d) *Ibid.* ss. 20, 21; Marriage Act, 1898, s. 6.

[There is no statutory requirement as to the presence of any officiating minister or witnesses in the cases of Quaker and Jewish marriages.]

Notice before Church of England marriage

1838. Where a marriage is to be celebrated according to the rites of the Church of England, it is necessary that, within three months before the celebration of such marriage: —

(i) public notice of such intended marriage ('publication of banns') be given audibly upon three Sundays during morning service (or, if there is no morning service, during evening service), immediately after the Second Lesson, in some church of the parish in which the parties shall dwell, or, if they dwell in different parishes, in a church of each such parish; *or*,

Marriage Act, 1823, ss. 2, 9. ('Church' includes certain chapels of the Church of England licensed for the purpose by the bishop (Act of 1823, ss. 3, 4; Marriage Act, 1836, s. 26). There appears to be no statutory definition of 'dwelling' for this purpose).

[In the cases of marriages of officers, seamen, and marines of His Majesty's Navy, the Naval Marriages Act, 1908, s. 1, makes provision for the publication of banns on board ship.]

(ii) a special licence be obtained from the Archbishop of Canterbury; *or*,

25 Hen. VIII (1533) c. 21, ss. 2–4.
Marriage Act, 1823, s. 20.
Marriage Act, 1836, s. 1.

(iii) a common licence be obtained from the Vicar General of the Archbishop of Canterbury or the Archbishop of York, or from the Chancellor or surrogate of a bishop of a diocese; *or*,

25 Hen. VIII (1533) c. 21, s. 9.
Marriage Act, 1823, ss. 10–19.
Ecclesiastical Jurisdiction Act, 1847, s. 5.

(iv) a Superintendent Registrar's certificate be obtained, as provided in § 1840, *post*.

Marriage Act, 1836, ss. 4, 5 (ss. 6 & 7 are repealed).
Births and Deaths Registration Act, 1837, s. 36.

Notice before other marriages

1839. When a marriage is to be celebrated not in accordance with the rites of the Church of England, it is necessary that, within three months before the celebration of such marriage, either: —

(i) a Superintendent Registrar's certificate be obtained, as provided in § 1840, *post; or*,

Marriage Act, 1836, s. 4.

(ii) a Superintendent Registrar's certificate and licence be obtained as provided in § 1841, *post*.

Marriage and Registration Act, 1856, ss. 2, 6.

Superintendent Registrar's certificate

1840. A Superintendent Registrar's certificate is obtained as follows: —

(i) Notice in writing of the intended marriage must be given by one of the parties to the

Superintendent Registrar of the district in which the parties have had their usual place of abode and residence for not less than seven days next preceding, or, if they dwell in different districts, to the Superintendent Registrar of each district, in a prescribed form.[a] The Superintendent Registrar must forthwith enter a copy of such notice in a book kept by him, called the Marriage Notice Book,[b] and cause the notice to be suspended or affixed in his office, in some conspicuous place.[c]

(a) Marriage Act, 1836, s. 4.
Marriage and Registration Act, 1856, ss. 2, 4, and Sched. A.
(b) Marriage Act, 1836, s. 5.
(c) Marriage and Registration Act, 1856, s. 4.

(ii) Such notice, or a copy thereof, must remain exhibited in the office of the Superintendent Registrar for twenty-one days.

Marriage and Registration Act, 1856, s. 4.

(iii) After twenty-one days from the entry of such notice in the Marriage Notice Book, the Superintendent Registrar must (subject to § 1845, *post*) issue to the person giving such notice a certificate in the prescribed form of such notice having been given.

Marriage and Registration Act, 1856, s. 4; and Sched. B.

Superintendent Registrar's certificate and licence

1841. A Superintendent Registrar's certificate and licence is obtained as follows:—

(i) Notice in writing of the intended marriage, stating that such marriage is to be by licence, must be given by one of the parties to the Superintendent Registrar of the district in which the party giving such notice has had his usual place of abode or residence for the space of fifteen days immediately preceding.[a] The Superintendent Registrar must forthwith enter a copy of such notice in the Marriage Notice Book;[b] but the notice must not be suspended in the office of the Superintendent Registrar.[c]

(a) Marriage and Registration Act, 1856, ss. 2, 6.
(b) Marriage Act, 1836, s. 5.
(c) Marriage and Registration Act, 1856, s. 5.

(ii) After the expiration of one whole day after the entry of such notice in the Marriage Notice Book, the Superintendent Registrar must (subject to § 1845, *post*) issue to the person giving such notice, a certificate of such notice having been given, and also a licence to marry.

Marriage and Registration Act, 1856, s. 9, and Sched. B.

Consent to marriage

1842. The consent of the following persons is (subject to § 1843, *post*) required for the

marriage of any minor, not being a widow or widower: —

(i) the father of the minor, if living;

Marriage Act, 1823, s. 16.

(ii) if the father is not living, the guardians of the minor or one of them (including the mother), not being guardians or a guardian appointed by the Court;

Marriage Act, 1823, s. 16.
Guardianship of Infants Act, 1886, ss. 2–4.

(iii) if there is no such guardian, the mother, being unmarried;

Marriage Act, 1823, s. 16.

[Since the Act of 1823 was passed, the mother of a minor has been made, in all cases, a guardian of the minor after his father's death (Guardianship of Infants Act, 1886, s. 2). *Quære:* if she has been removed from that position by the Court under s. 6 of that Act, can she still, if unmarried, consent under s. 16 of the Act of 1823?]

(iv) if there is no mother unmarried, the guardian or guardians (if any) appointed by the Court, or one of them.

Marriage Act, 1823, s. 16.

If there is no such person, no consent is required.

Marriage Act, 1823, s. 16.

Consent by Court

1843. If the person whose consent to the marriage is required under § 1842 is insane, or (not

being the father of the minor [a]) is beyond the seas, or if such consent (except in the case of the father [a]) is unreasonably withheld, the Court may give its consent to the marriage; and such consent has the same effect as the consent of the person whose consent is required by § 1842.[b]

(a) *Ex parte I. C.* (1838) 3 Myl. & C. 471.
(b) Marriage Act, 1823, s. 17.

[The absence of consent does not make the marriage void (*R.* v. *Birmingham* (1828) 8 B. & C. 29; and see *Holmes* v. *Simmons* (1868) L. R. 1 P. & D., at p. 528). But if the marriage of a minor is procured without consent by the false oath or declaration of one of the parties (§ 1844, *post*), the Attorney or Solicitor General may, at the relation of the person whose consent is required, sue for a forfeiture of any interest in property accruing to such party by reason of the marriage; and the Court may declare a forfeiture, and provide for the settlement of the forfeited property for the purpose of preventing the offending party from deriving any benefit therefrom (Marriage Act, 1823, ss. 14, 23; Marriage and Registration Act, 1856, s. 19).]

Evidence of consent

1844. When either of the parties to the intended marriage is a minor, not being a widow or widower, the person applying for such a licence as is described in § 1838 (iii), *ante*, or for such certificate or certificate and licence as is referred in § 1839, *ante*, must state on oath, in the case of a licence under § 1838 (iii), or make a solemn declaration in the case of a certificate, or certificate and licence, under § 1839, that the consent of such person (if any) whose consent is required under § 1842, *ante*, has been obtained, or that there is no such person. No such licence,

certificate, or certificate and licence may be issued unless such statement on oath or declaration (as the case may be) has been made.

Marriage Act, 1823, s. 14.
Marriage and Registration Act, 1856, s. 2.

[For the effect of a false oath or declaration under this §, see note to § 1843, *ante*.]

Forbidding the marriage

1845. A person whose consent is required under § 1842, *ante*, may:—

(i) at the time of the publication of the banns of the marriage, and in the church where such banns are published, openly declare his dissent from such marriage. The effect of such declaration is to make the publication of banns void;

Marriage Act, 1823, s. 8.

(ii) forbid the issue of the Superintendent Registrar's certificate, or certificate and licence, referred to in § 1839, *ante*, by making an entry in a prescribed form to that effect in the Marriage Notice Book, before the issue of the Superintendent Registrar's certificate. No such certificate, or certificate and licence, may be issued after such prohibition; and such certificate, or certificate and licence, if issued after such prohibition, is void;

Marriage Act, 1836, ss. 9, 10, 40.

(iii) enter a caveat against the issue of such licence as is described in § 1838 (iii), or such certificate or licence as is referred to in § 1839, *ante*. After the entry of such caveat, no licence, certificate, or certificate and licence, may be issued until such caveat has been withdrawn or disposed of.

Marriage Act, 1823, s. 11.
Marriage Act, 1836, s. 13.

Place of Church of England marriage

1846. A marriage celebrated in accordance with the rites of the Church of England must be celebrated: —

(i) if with publication of banns, in the church or one of the churches in which the banns have been published;

Marriage Act, 1823, s. 2.

(ii) if a special licence under § 1838 (ii) *ante*, has been obtained, in the place specified in such licence;

Marriage Act, 1823, s. 20.
Marriage Act, 1836, s. 1.

(iii) if a common licence under § 1838 (iii), *ante*, has been obtained, in the church specified in the licence, which must be a church or public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married

has been for fifteen days immediately before the granting of such licence;

Marriage Act, 1823, s. 10.

(iv) if a Superintendent Registrar's certificate under § 1838 (iv), *ante*, has been obtained, in the church specified in such certificate.

Marriage Act, 1836, s. 42.

Place of other marriages

1847. A marriage not celebrated in accordance with the rites of the Church of England must be celebrated in the place specified in the notice and certificate described in §§ 1840, 1841, *ante*.[a] Such place must (except in the case of marriages celebrated in accordance with the usages of the Quakers or Jews) be a registered building, or the office of the Superintendent Registrar.[b]

(a) Marriage Act, 1836, s. 42.
(b) *Ibid.*, ss. 20, 21.

[As a rule, the registered building must be in the district in which one of the parties has dwelt for the required time. But there are exceptions (Marriage Act, 1840, ss. 1, 2).]

Canonical hours

1848. Every marriage, unless a special licence has been obtained under the provisions of § 1838 (ii) *ante*, must be celebrated with open doors, between the hours of eight in the morning and three in the afternoon.

Marriage Act, 1836, ss. 1, 20.
Marriage Act, 1886, s. 1 (1).

[*Quære:* Whether this provision applies to marriages celebrated according to the usages of Quakers or Jews?]

Marriages celebrated abroad

1849. A marriage may be validly celebrated out of England in any of the following ways:—

(i) according to the form recognized as valid by the law of the country in which the marriage takes place;

Dalrymple v. *Dalrymple* (1811) 2 Hagg. Con. 54.
Swift v. *Kelly* (1835) 3 Knapp, 257 (P. C.).
Simonin v. *Mallac* (1860) 2 Sw. & Tr. 67.
Swifte v. *A. G. for Ireland* [1912] A. C. 276.

(ii) according to the form recognized as valid by the law of the State to which the parties belong, in cases where the marriage is celebrated either (*a*) in a place in which the parties enjoy the privilege of ex-territoriality,[a] or (*b*) in a place in which the use of the form recognized by the local law is impossible;[b]

(a) *R.* v. *Brampton* (1808) 10 East, 282.
(b) *Ruding* v. *Smith* (1821) 2 Hagg. Con. 371.
Dicey, *Conflict of Laws*, (2nd edn.) pp. 614, 622.

[The 'form recognized as valid by the law of the State to which the parties belong' probably means, in the case of British subjects, the form recognized as valid by the English common law, *i. e.* a religious ceremony performed by a minister of the Church of England or of the Roman Catholic or some other episcopal Church (*ibid.*, p. 620, n. (2); *Catherwood* v. *Caslon* (1844) 13 M. & W. 261).]

(iii) by a chaplain or officer or some other person officiating under the orders of the commanding officer of a British army, within the lines of such army serving abroad;

Foreign Marriage Act, 1892, s. 22.

(iv) according to the provisions of the Foreign Marriage Act, 1892, in cases where the marriage is celebrated outside the United Kingdom, between persons of whom one at least is a British subject.

Foreign Marriage Act, 1892, ss. 1–21. (Under this Act, a marriage may be celebrated either in accordance with the rites of the Church of England, or according to such form and ceremony as the parties may see fit to adopt provided that they use the words set out in § 1835 (iv), *ante*, including those in square brackets, but omitting the word 'do' (s. 8 (3)). Whatever form is adopted, a Marriage Officer (such as a British ambassador or consul, or the Commander of one of His Majesty's ships), and two witnesses, must be present. But another person may celebrate the marriage (s. 8 (2)). Notice of the intended marriage, similar to that required by § 1840 (i), *ante*, must be given to the Marriage Officer, not less than fourteen days, or more than three months, before the marriage (ss. 2, 6, 8 (1)). As regards consents of parents and guardians to the marriage of minors abroad, provisions similar to those of §§ 1842, 1843, *ante*, apply (s. 4). The marriage must be celebrated at the official house of the Marriage Officer, or on board one of His Majesty's ships on a foreign station (ss. 8 (2), 13 (2)), in the former case with open doors, and between the hours of eight in the forenoon and three in the afternoon (s. 8 (2)).)

[The Merchant Shipping Act, 1894, ss. 240 (6), 253 (1) (viii), appears to contemplate the possibility of marriage being celebrated on board a British merchant ship. But there seems to be no authority as to the manner in which such a marriage may be celebrated. For the facilitation of colonial marriages, and of marriages in the United Kingdom of British subjects resident in the colonies, see Marriage of British Subjects (Facilities) Act, 1915, and Orders in Council (if any) thereunder.]

TITLE II — INVALID AND VOIDABLE MARRIAGES

1850. A marriage celebrated in England is void unless celebrated substantially in one of the ways specified in Tit. I, §§ 1836, 1837, *ante*. *Informality generally*

Marriage Act, 1823, s. 22.
Marriage Act, 1836, s. 42.
The Queen v. *Millis* (1843) 10 Cl. & F. 534.

1851. A marriage purporting to be celebrated in accordance with the rites of the Church of England is void:— *In Church of England marriages*

(i) if, to the knowledge of both parties, the marriage (not being a marriage by special licence) is celebrated in any place other than such church as is described in Tit. I, § 1846 (i), *ante;*

(ii) if, to the knowledge of both parties, the marriage (not being a marriage by special licence) is celebrated without due publication of banns, or such licence or certificate as is described in Tit. I, § 1838, *ante;*

(iii) if, to the knowledge of both parties, the marriage is celebrated by a person not in Holy Orders.

Marriage Act, 1823, s. 22.
Marriage Act, 1836, s. 42.

[The publication of banns under a name known to both parties to be false in any material particular, with the object of concealing identity, avoids the marriage (*Tongue* v. *Tongue* (1836) 1 Moo. P. C. 91 (concealment of Christian name); *Midgley* v. *Wood* (1860) 30 L. J. (P. M. & A.) 57 (false Christian name); *Wormald* v. *Neale* (1868) 19 L. T. 93 (false surname)). If the defect is known to one party only, the marriage is valid (*R.* v. *Wroxton* (1833) 4 B. & Ad. 640 (false name); *Gompertz* v. *Kensit* (1872) L. R. 13 Eq. 369 (omission of Christian names); *Templeton* v. *Tyree* (1872) L. R. 2 P. & M. 420 (incorrect ages); *Greaves* v. *Greaves*, *ibid.* 423 (no banns or licence)). A misdescription in a licence (at any rate unless fraudulent) will not invalidate a marriage (*Cope* v. *Burt* (1809) 1 Hagg. Con. 434; *Wheatley* v. *Wheatley* (1814) 2 Hagg. Con. 175; *Haswell* v. *Haswell* (1881) 51 L. J. (P. D. & A.) 15). In *Cope* v. *Burt*, *ubi sup.*, at p. 439, and in *Lane* v. *Goodwin* (1843) 4 Q. B., at p. 366, the opinion was expressed, that a licence might not be valid if obtained for one person with the intention that it should be used for another. As to misdescription in a notice leading to a Superintendent Registrar's certificate, see next §. A marriage celebrated by a person not in Holy Orders, but supposed by the parties to be in Holy Orders, is, probably, valid. But the point is doubtful (*Hawke* v. *Corri* (1820) 2 Hagg. Con., at p. 288; *R.* v. *Ellis* (1888) 16 Cox, at p. 471; Marriages Validation Act, 1888).]

In other marriages

1852. A marriage purporting to be celebrated in one of the ways described in Tit. I, § 1835, *ante*, other than a marriage according to the rites of the Church of England, is void:—

(i) if, to the knowledge of both parties, it is celebrated in some place other than the place specified in the notice and certificate described in Tit. I, §§ 1840 and 1841, *ante*;

(ii) if, to the knowledge of both parties, it is celebrated without such notice as is described in §§ 1840 and 1841, *ante*, or without

such certificate and licence (where a licence is necessary) as is therein described;

(iii) if, to the knowledge of both parties, the marriage (not being a marriage according to the usages of the Quakers or Jews), is celebrated without the presence of such Registrar, Superintendent Registrar, or 'authorized person,' as is required under Tit. I, § 1837, *ante*.

Marriage Act, 1836, s. 42.
Marriage Act, 1898, ss. 6 (3), 15.

[A misdescription in a notice leading to the Superintendent Registrar's certificate or licence does not make the marriage void; even though the misdescription be known to both parties, and fraudulent (*Holmes* v. *Simmons* (1868) L. R. 1 P. & D. 523; *Prowse* v. *Spurway* (1877) 46 L. J. (P. D. & A.) 49; *Re Rutter* [1907] 2 Ch. 593 (surname false to the knowledge of both parties)). Perhaps the notice and certificate or licence would be mere nullities if the name were wholly false (*Holmes* v. *Simmons*, *ubi sup.*, at p. 529, *per* Lord Penzance). No question as to the correctness of the statement as to the dwelling of either of the parties in the notice can be raised after the marriage has been celebrated (Marriage and Registration Act, 1856, s. 17).]

Lunacy

1853. A marriage is void if either of the parties was, at the date thereof, a lunatic who had been so found by inquisition or whose person and estate had been committed to the care and custody of particular trustees; unless he had, before such marriage, been declared sane by a competent Court, or by such trustees or the majority of them.

Marriage of Lunatics Act, 1811.
Turner v. *Meyers* (1808) 1 Hagg. Con., at p. 417.

Previous marriage

1854. A marriage is void if, at the date thereof, either party was lawfully married to some other person; even if one or both of the parties was ignorant of the previous marriage, or believed that it had been dissolved by death or otherwise.

Re Wilson's Trusts (1865) L. R. 1 Eq. 247; L. R. 3 H. L. 55 (*sub nom. Shaw* v. *Goula*).

Prohibited degrees

1855. A marriage is void: —

(i) if the parties to it are related to one another lineally, or as brother and sister, uncle and niece, aunt and nephew;

(ii) if (subject to § 1856, *post*) one of the parties is related, through a former wife or husband, to the other in one of the degrees or ways specified in (i).

28 Hen. VIII (1535) c. 7, ss. 7, 11.
28 Hen. VIII (1536) c. 16, s. 2.
32 Hen. VIII (1540) c. 38.
1 Eliz. (1558) c. 1, s. 3.
Marriage Act, 1835, s. 2.
R. v. *Chadwick* (1847) 11 Q. B. 205.
Re Wood (1874) L. R. 9 Ch. App. 670.

[Before the Act of 1835, such marriages were merely voidable by sentence of the Ecclesiastical Court, which could only be pronounced during the lifetime of both parties (Marriage Act, 1835, pr.).]

Relationship of the half-blood has in this respect the same effect as relationship of the whole blood;[(a)] and illegitimate blood relationship the same as that of

legitimate.[b] But illicit carnal connexion does not constitute affinity.[c]

(a) *Mette* v. *Mette* (1859) 28 L. J. (P. & M.) 117 (half-sister of wife). *R.* v. *Brighton* (1861) 1 B. & S. 447 (daughter of illegitimate half-sister of wife).
(b) *R.* v. *St. Giles in the Fields* (1847) 11 Q. B. 173, 244. *R.* v. *Chadwick, ubi sup.* *R.* v. *Brighton, ubi sup.*
(c) *Wing* v. *Taylor* (1861) 30 L. J. (P. & M.) 258. (But see the remarks of Jeune, P., in *Moss* v. *Moss* [1897] P., at p. 266.)

Deceased wife's sister

1856. No marriage contracted between a man and his deceased wife's sister (including her half-sister), whether before or after 28th August, 1907, is to be deemed void or voidable, as a civil contract, only because of such affinity; but if, before that day, any such marriage had been annulled, or either party thereto (after the marriage and during the life of the other) had lawfully married another, such marriage is to be deemed to have become void upon the day upon which it was so annulled, or upon which either party thereto so married.

Deceased Wife's Sister's Marriage Act, 1907, ss. 1, 5.

[Before the Act such marriages between persons domiciled in England were void (*Mette* v. *Mette, ubi sup.*; *Brook* v. *Brook* (1861) 9 H. L. C. 193). The Act of 1907 contains provisions: —

(i) protecting clergymen from proceedings and penalties for refusing to celebrate such marriages (s. 1) — but this provision does not protect a clergyman from proceedings in respect of his refusal to admit to Holy Communion persons whose marriage is legalized by the Act (*Bannister* v. *Thompson* [1908] P. 362; *Thompson* v. *Dibdin* [1912] A. C. 533);

(ii) saving vested or contingent interests existing at the passing of the Act (see *Re Whitfield* [1911] 1 Ch. 310; *Re Green* [1911] 2 Ch. 275) and the claim of the Crown to Death Duties becoming due before the passing of the Act (s. 2);

(iii) requiring that the Act shall not affect the devolution or distribution of the estate of any intestate, not being a party to the marriage, who was, at the date of the passing of the Act, and continued till the time of his death, to be a lunatic so found by inquisition (s. 2).

The Act does not authorize marriage between a man and the sister of his divorced wife, during the lifetime of such wife (s. 3 (2).]

Age of capacity

1857. The marriage of a male under the age of fourteen years, or of a female under the age of twelve years, is voidable at the option of such person, and, possibly, of the other party. Such person, and, possibly, the other party to the marriage, may, when such person attains the prescribed age, either affirm or repudiate the marriage. Cohabitation after attainment of the prescribed age amounts to affirmation of the marriage.

Co. Litt. 79 a.

[Marriages below the ages mentioned do not occur at the present time; though they were formerly not uncommon (See Co. Litt. 33 a; Pollock and Maitland, *History of English Law* (2nd edn.) II, 390–392). In Coke's time it was settled law, that a wife who had attained the age of nine years was entitled to dower, whatever the age of the husband. At an earlier time, it was a question of fact whether she could 'dotem promereri et virum sustinere.']

Insanity

1858. A marriage will be declared void by the Court on the ground of the insanity of either of the

parties, existing at the time of the marriage; if the insanity was such as to prevent the insane party from understanding the nature of the contract of marriage and the duties and responsibilities which it creates.[a] The sane, as well as the insane, party may apply to the Court to have the marriage declared void on this ground.[b]

(a) *Durham* v. *Durham* (1885) 10 P. D. 80.
Jackson v. *Jackson* [1908] P. 308.
(b) *Durham* v. *Durham*, *ubi sup.*; *Hunter* v. *Edney* (1885) 10 P. D. 93 (petitions by sane party).
Turner v. *Meyers* (1809) 1 Hagg. Con. 414; *Hancock* v. *Peaty* (1867) L. R. 1 P. & M. 335 (petitions by insane party).

[It was suggested in *Sullivan* v. *Sullivan* (1818) 2 Hagg. Con., at p. 246, that intoxication (produced by conspiracy) might be insanity for this purpose. *Quære:* whether the invalidity of the marriage could be asserted on the ground of insanity, otherwise than upon an application to the Court in its matrimonial jurisdiction?]

Want of consent

1859. A marriage may be declared void by the Court on the ground that one of the parties went through the form of marriage without freely consenting thereto. (*Semble*) only the party whose want of consent is alleged may apply to have the marriage declared void on this ground.

Scott v. *Sebright* (1886) 12 P. D. 21 (duress and undue influence)
Ford v. *Stier* [1896] P. 1 (parental influence; petitioner thought she was going through a betrothal only) (marriage held void).
Cooper v. *Crane* [1891] P. 369 (respondent had threatened suicide if petitioner would not marry him) (marriage held valid).

[In none of these cases had the marriage been consummated. *Quære:* whether the invalidity of a marriage could be asserted on the ground of want of consent, otherwise than upon an application to the Court in its matrimonial jurisdiction? (*Lady Fulwood's Case* (1637) Cro. Car., at p. 488).]

Fraud and mistake

1860. Where there is free consent to a marriage, no fraud or mistake inducing the consent is a ground for declaring the marriage void.

Wakefield v. *Mackay* (1807) 1 Phill., at p. 137.
Ewing v. *Wheatley* (1814) 2 Hagg. Con., at p. 183.
Sullivan v. *Sullivan* (1818) *ibid.*, at p. 248.
Moss v. *Moss* [1897] P. 263 (fraudulent concealment of pregnancy).

Impotence

1861. A marriage may be annulled, at the instance of one of the parties, on the ground of the permanent and incurable incapacity,[a] or the persistent unwillingness,[b] existing from the celebration of the marriage, on the part of the other, to have sexual intercourse. The Court may, in its discretion, annul the marriage on the application of an impotent party; but such discretion is one which is very carefully exercised,[c] and, *semble*, the Court will not annul a marriage at the suit of a merely unwilling party. Such marriages are voidable only, not void; and remain valid until annulled by the Court acting in its matrimonial jurisdiction.[d]

(a) *M.* v. *D.* (1885) 10 P. D. 75. (The Court has no power to hold proceedings of this kind *in camerâ*, merely in the interests of decency (*Scott* v. *Scott* [1913] A. C. 417).)

(b) *Dickinson* v. *Dickinson* [1913] P. 198. (The Court formerly treated unwillingness merely as evidence of incapacity; but, in this case, the Court treated it as an independent ground for a decree of nullity.)
(c) *A.* v. *A.* (1885) 19 Ir. R. Ch. 403.
G. v. *G.* (1908) XXV T. L. R. 328.

[But see *Norton* v. *Seton* (1819) 3 Phill. 147; *Halfen* v. *Brodington* (1881) 6 P. D. 13; *Turner* v. *Thompson* (1888) 13 P. D. 37; *Dickinson* v. *Dickinson*, *ubi sup.* The validity of the marriage cannot be impeached after the death of either party (*A.* v. *B.* (1868) L. R. 1 P. & M. 559).]

(d) *Elliott* v. *Gurr* (1812) 2 Phill. 16.
A. v. *B.*, *ubi sup.*
Dickinson v. *Dickinson*, *ubi sup.*

Grievance must be genuine

1862. The Court will refuse to annul a marriage on the ground of such incapacity or unwillingness as is mentioned in § 1861, *ante*, if the petitioner is guilty of 'insincerity.'[a] Delay in presenting a petition for annulment, if not satisfactorily explained, is evidence of insincerity; but is not in itself a ground for refusing relief.[b]

(a) *M.* v. *C.* (1872) L. R. 2 P. & M. 414.
W. v. *R.* (1876) 1 P. D. 405 (where it is explained (at p. 408) that "the law has always required sincerity in the complainer, that is, a real sense of the grievance complained of, unmixed with any other subsidiary motive, and, as a necessary proof of such sincerity, has also required all reasonable promptitude to be exhibited in seeking legal redress." —*per* Phillimore, J.).

[But a wife's petition for nullity has been granted, where she had taken proceedings only after her adultery had been discovered by her husband (*M.* v. *D.* (1885) 10 P. D. 75; *S.* v. *S.* [1907] P. 224).]

(b) *B.* v. *M.* (1852) 2 Rob. Ecc. 580.
Castleden v. *Castleden* (1861) 9 H. L. C. 186.
M. v. *D.* (1885) 10 P. D. 75.

TITLE III — JACTITATION OF MARRIAGE

Grounds for

1863. If a person persistently and falsely alleges that he is married to another, the latter may, in a suit of jactitation of marriage, obtain a decree forbidding the former to make such allegations. No such decree will be granted in favour of a person who has at any time acquiesced in the making of such allegations by the other party.

Thompson v. *O'Rourke* [1893] P. 11, 70.

[A judgment in such action is not conclusive for or against the fact of the marriage in proceedings between other parties (e. g. in an indictment for bigamy); and it is not clear that it would be conclusive even between the parties (*Duchess of Kingston's Case* (1776) 20 Howell St. T., at pp. 542–3; 2 Smith L. C. (11th edn.) at pp. 737–8, *per* De Grey, C. J.).]

TITLE IV — RIGHTS AND DUTIES ARISING OUT OF MARRIAGE

Cohabitation

1864. Husband and wife are under a duty to each other to cohabit,[a] unless they have been judicially separated or have mutually agreed to separate,[b] or unless one party has deprived himself of the right to require cohabitation by committing a matrimonial offence,[c] or has otherwise so acted as to make it unreasonable that the other party should be required to cohabit.[d]

(a) *Wilkinson* v. *Wilkinson* (1871) L. R. 12 Eq. 604.

[Cohabitation does not necessarily involve sexual intercourse. At any rate the Court will not make an order for enforcing such intercourse (*Orme* v. *Orme* (1824) 2 Add. 382; *Rowe* v. *Rowe* (1865) 34 L. J. (P. D. & A.) 111).]

(b) *Clark* v. *Clark* (1885) 10 P. D. 188.

[But the existence of a separation deed is not always a bar to a petition for restitution of conjugal rights, *e. g.* where covenants in the deed have been broken (*Kennedy* v. *Kennedy* [1907] P. 49).]

(c) *i. e.* conduct such as adultery, cruelty, or desertion, which would entitle the injured party to sue for divorce or judicial separation (see *post*, Tit. V).

(d) *Russell* v. *Russell* [1895] P. 315.

Restitution of conjugal rights

1865. If one party refuses to cohabit, the other may obtain from the Court a decree for restitution

of conjugal rights. Such a decree cannot be enforced by attachment; but, where it is obtained by the wife, the Court may order that, in the event of the decree being disobeyed, the husband shall make to her such periodical payments as may be just, and may make an order for enforcing or securing to the wife such payments [a] during the joint lives of the parties or any shorter period. Where the decree is obtained by the husband, and the wife is entitled to property, or is in receipt of any profits of trade or earnings, the Court may order a settlement to be made of such property, for the benefit of the husband and the children of the marriage, or of either or any of them, or may order part of such profits of trade or earnings to be periodically paid to the husband for his own benefit, or to the husband or any other person for the benefit of the children of the marriage, or either or any of them.[b]

(a) Matrimonial Causes Act, 1884, s. 2.
Tangye v. *Tangye* [1914] P. 201 (overruling *Clutterbuck* v. *Clutterbuck* (1913) 108 L. T. 573).

[But such an order must not be made as a penalty, with a view of enforcing the decree for restitution (*Tangye* v. *Tangye*, *ubi sup.*).]

(b) Matrimonial Causes Act, 1884, s. 3.

[As to the effect of disobedience to an order for restitution in constituting statutory desertion, see *post*, Tit. V, §§ 1874, 1880. As to the right of the husband to sue third person through whose acts he is deprived of the *consortium* of his wife, see *ante*, Bk. II, Pt. III, Sect. V, Tit. II, §§ 950–954. As to possible rights of the wife in a similar case, see *ibid.* §§ 954, 955. As to the husband's claim for damages against a person who commits adultery with the wife, see *post*, Tit. V, §§ 1895, 1896.]

Husband may not coerce wife

1866. A husband is not entitled to use force, or to keep his wife in confinement, for the purpose of compelling his wife to live with him;[a] nor is he entitled to a writ of Habeas Corpus for the purpose of restoring her to his custody.[b]

(a) *R.* v. *Jackson* [1891] 1 Q. B. 671. (The husband was compelled by a writ of Habeas Corpus to restore his wife to liberty. It was left open whether a husband might not use force to restrain his wife from matrimonial misconduct (*ibid.*, at pp. 679, 683, 685). It has never been suggested that the wife has any right to use force against her husband to compel him to live with her.)
(b) *R.* v. *Leggatt* (1852) 18 Q. B. 781.

Maintenance by husband

1867. It is the duty of a husband to maintain his wife according to his estate and condition;[a] unless they are living apart through her fault.[b]

(a) *Jenkins* v. *Tucker* (1788) 1 H. Bl., at p. 94, *per* Gould, J.
Read v. *Legard* (1851) 6 Exch. 636.
(b) *Hindley* v. *Westmeath* (1827) 6 B. & C. 200.
R. v. *Flinton* (1830) 1 B. & Ad. 227.
Johnston v. *Sumner* (1858) 3 H. & N. 261.
Culley v. *Charman* (1881) 7 Q. B. D. 89.

[The husband's liability may be enforced (i) by criminal proceedings under the Vagrancy Act, 1824, ss. 3, 4, and the Poor Relief (Deserted Wives and Children) Act, 1718, s. 1, if the wife in consequence of the husband's neglect becomes chargeable to the Poor Law authorities, (ii) by an order of a court of summary jurisdiction for payment to the Poor Law authorities towards her support (Poor Law Amendment Act, 1868, s. 33), (iii) by proceedings under the Summary Jurisdiction (Married Women) Act, 1895, ss. 4, 5, whereby an order for payment of a weekly sum not exceeding two pounds can be obtained, (iv) by means of a suit for restitution of conjugal rights (see *ante*, § 1865) or for judicial separation (see *post*, Tit. V, §§1880–1884). The husband's duty to maintain his wife is also recognized in the rules relating to the wife's power to pledge the husband's credit (see *ante*, Bk. I, Sect. III, Tit. IV,

§§ 132, 133). It appears to be generally assumed that the husband is entitled to determine the place of residence, and the scale of living. But there is little (if any) authority on the point.]

Liability of wife

1868. A wife is under no liability to maintain her husband, except that, if she has separate estate, and her husband becomes chargeable to a Poor Law authority, a court of summary jurisdiction may make and enforce such order against her for the maintenance of her husband as it may make and enforce, under the Poor Law Amendment Act, 1868, s. 33, against a husband for the maintenance of his wife if she becomes chargeable to a Poor Law authority.

Married Women's Property Act, 1882, s. 20.

[For the provisions of the Poor Law Amendment Act, 1868, s. 33, see § 1867, note (ii).]

Funeral of wife

1869. A husband is liable for expenses reasonably incurred in respect of the funeral of his wife,[a] even though she was living apart from him at her death,[b] and is entitled to be repaid or to retain, out of her property, any such expenses paid by him.[c]

(a) *Jenkins* v. *Tucker* (1788) 1 H. Bl. 90.
(b) *Ambrose* v. *Kerrison* (1851) 10 C. B. 776.
Bradshaw v. *Beard* (1862) 12 C. B. N. S. 344.

[*Quære:* if she had been living apart from him against his will and without excuse.]

(c) *Gregory* v. *Lockyer* (1821) 6 Madd. 90.
Willeter v. *Dobie* (1856) 2 K. & J. 647.
Re McMyn (1886) 33 Ch. D. 575.

[In the two earlier cases, the wife had by her testament charged the separate property with payment of funeral expenses. But *Re McMyn* (in which the husband, being executor, was held entitled to retain funeral expenses, although the estate was insufficient to pay creditors) shows that the husband's right does not depend on there being any charge by will.]

Wife's income received by husband

1870. When a wife permits her husband to receive the income of her separate estate for their joint purposes, while the parties are living together and the husband is maintaining the wife, it is presumed that it was intended that such income should become the property of the husband.

Caton v. *Rideout* (1849) 1 Mac. & G. 599.
Re Dixon [1900] 2 Ch., at p. 280, *per* Rigby, L. J.

[There is no such presumption when accumulations of the wife's income have been used to make a purchase in the husband's name; and the burden of proof in such a case is on the husband to show that a gift to him was intended (*Mercier* v. *Mercier* [1903] 2 Ch. 98). Similarly, where the husband receives capital belonging to the wife's separate estate, the burden of proof is on him to show that it was a gift (*Dixon* v. *Dixon* (1878) 9 Ch. D. 587; *Re Flamank* (1889) 40 Ch. D. 461).]

Wife's savings

1871. When husband and wife are living together,[a] or only temporarily living apart,[b] and the wife makes savings out of money given to her by the husband for household purposes, or for the maintenance of herself and her children, such savings, and any investments representing them, belong

to the husband; unless there is evidence that he intended them to be her property.

(a) *Lady Tyrrell's Case* (1674) Freeman, K. B. 304.
Barrack v. *McCulloch* (1856) 3 K. & J., at p. 114; *per* Wood, V. C.

[See also *Mews* v. *Mews* (1852) 15 Beav. 529 (savings of poultry and dairy business carried on by wife on husband's farm). The rule does not apply to the wife's savings from her separate property (*Messenger* v. *Clarke* (1850) 5 Exch., at p. 392, *per* Alderson, B.; *Re Mackenzie* [1911] 1 Ch. 578).]

(b) *Messenger* v. *Clarke* (1850) 5 Exch. 388.
Birkett v. *Birkett* (1908) 98 L. T. 540.

[In *Slanning* v. *Style* (1734) 3 P. Wms. 334, the expressions of the husband, and in *Brooke* v. *Brooke* (1858) 25 Beav. 342, the duration of the separation, and other circumstances, were sufficient to prevent the husband from claiming the savings (see *Birkett* v. *Birkett*, *ubi sup.*).]

NOTE

Marriage does not, since the passing of the Married Women's Property Acts, 1882–1918, confer any rights on the husband in the wife's property, except rights of intestate succession which may be defeated by the wife's testament; and the wife's right of dower in respect of her husband's real estate has, by the Dower Act, 1833, been converted into a mere right of intestate succession, which may be defeated by the husband's deed or testament. (As to these, see *post*, Book V, Sect. II.) So too, any rights (other than rights of intestate succession defeasible by the husband's testament) which the wife may have had to succeed to her husband's personalty by local custom, were abolished by the statutes 4 & 5 W. & M. (1692) c. 2; 7 & 8 W. III (1695) c. 38; 2 & 3 Anne (1703) c. 5; 11 Geo. I (1724) c. 18, ss. 17–18. The relations of husband and wife with regard to property, and liability for contract and tort, are dealt with in Bk. I, Sect. III, Tit. I, § 71, Tit. II, §§ 105–108, Tit. IV, §§ 132, 133, 136, 137, Bk. III, Sect. VII, Tit. II, §§ 1506–1512, and Sect. XII, §§ 1613, 1614. It may be noted here, in relation to Bk. I, Sect. III, Tit. I, § 71, *ante*, that, by s. 125 of the Bankruptcy Act, 1914, (i) a married woman who carries on a trade or business, whether separately from

her husband or not, is now subject to the bankruptcy laws as if she were a *feme sole;* (ii) in case of a married woman so carrying on a trade or business, a judgment may be made available for bankruptcy proceedings against her as though she were personally bound to pay the judgment debt; (iii) that, by s. 52, if a married woman is made bankrupt, her property which is subject to a restraint on anticipation may be made available for distribution among her creditors; and (iv) that, by s. 36, a husband or wife is not allowed to claim any dividend as a creditor in the other's bankruptcy, in respect of money or other property lent or entrusted to the bankrupt for purposes of trade, until all claims of other creditors for valuable consideration in money or money's worth have been satisfied. (The Conveyancing Act, 1881, s. 39, on which Bk. I, Sect. III, Tit. II, § 107, *ante*, is founded, has been amended by the Conveyancing Act, 1911, s. 7.) When a married woman is joint author with her husband of a work, her interest in the copyright is her separate property (Copyright Act, 1911, s. 16 (4)).

TITLE V — NULLITY, DIVORCE, AND JUDICIAL SEPARATION

Nullity

1872. The Court may pronounce a decree declaring a reputed or voidable marriage to be null and void on any of the grounds specified in Title II, *ante;* but subject to the conditions and in the discretion in that Title described.[a] Such a decree is, in the first instance, a decree *nisi* only, not to be made absolute till after the expiration of six months from the pronouncing thereof, or such shorter time (not less than three months) as the Court shall specially order; and upon cause being shown in the meantime to the Court by any person (including the King's Proctor) the Court may refuse to make absolute such decree *nisi,* on the ground of collusion, or on the ground that material facts were not brought before the Court.[b]

(a) Matrimonial Causes Act, 1857, s. 6.
(b) Matrimonial Causes Act, 1860, s. 7.
Matrimonial Causes Act, 1866, s. 3.
Matrimonial Causes Act, 1873, s. 1.
Watton v. *Watton* (1866) L. R. 1 P. & M. 227. (This was a decree for divorce, but the reasoning applies.)

[The King's Proctor's intervention on the ground of collusion is not limited to six months; but may be made at any time before decree absolute (Act of 1860, s. 7).]

Divorce for wife's adultery

1873. A husband is entitled, subject to the provisions of this Title, to obtain from the Court a

decree dissolving the marriage ('divorce'), if he proves to the satisfaction of the Court that his wife has, since the celebration of the marriage, been guilty of adultery.[a] Adultery implies a voluntary act.[b]

(a) Matrimonial Causes Act, 1857, ss. 27, 31.
(b) *Long* v. *Long* (1890) 15 P. D. 218. (But see *Hyman* v. *Hyman* [1904] P., at p. 407.)
Yarrow v. *Yarrow* [1892] P. 92.

[Before the passing of the Matrimonial Causes Act, 1857, the word 'divorce' was ambiguous. It might mean either (a) dissolution, effected by Act of Parliament, of a fully valid marriage, or (b) the annulment, by a decree of an ecclesiastical court, of a void or voidable marriage (divorce *a vinculo matrimonii*), or (c) separation by decree of an ecclesiastical court, which did not, however, dissolve the marriage (divorce *a mensâ et thoro*). Until 1857, no judicial tribunal had power to dissolve a valid marriage. Since the passing of the Act, the process corresponding to the old 'divorce *a mensâ et thoro*' has become known as a 'judicial separation'; and the term 'divorce' is now restricted to a dissolution of the marriage tie by decree or statute. By the Act of 1857, the matrimonial jurisdiction of the ecclesiastical courts was transferred to a new Court (the 'Court for Divorce and Matrimonial Causes'), which was absorbed into the High Court of Justice by the Judicature Act, 1873, s. 3.]

Wife's right to divorce

1874. A wife is entitled, subject to the provisions of this Title, to obtain from the Court a decree dissolving the marriage, if she proves to the satisfaction of the Court that her husband has, since the celebration of the marriage, been guilty of:—

(i) incestuous adultery; *or*,
(ii) bigamy with adultery; *or*,
(iii) rape; *or*,
(iv) sodomy or bestiality; *or*,

(v) adultery coupled with such cruelty as without adultery would entitle her to a decree of judicial separation (*post*, § 1880); *or*,

(vi) adultery coupled with desertion, without reasonable excuse, for two years or upwards,[a] or coupled with desertion constituted by the fact of the husband having refused to comply with a decree of restitution of conjugal rights,[b] whether the adultery was committed before or after the decree of restitution.[c]

(a) Matrimonial Causes Act, 1857, ss. 27, 31.
(b) Matrimonial Causes Act, 1884, s. 5.
(c) *Bigwood* v. *Bigwood* (1888) 13 P. D. 89. *Beauclerk* v. *Beauclerk* [1895] P. 220.

['Incestuous adultery' is adultery committed by a husband with a woman with whom (even if his wife were dead) he could not lawfully contract marriage, by reason of her being within the prohibited degrees of consanguinity or affinity (Matrimonial Causes Act, 1857, s. 27; see *ante*, Sect. I, Tit. II, § 1855), and also, in spite of the Deceased Wife's Sister's Marriage Act, 1907, s. 1, adultery with a wife's sister (Deceased Wife's Sister's Marriage Act, 1907, s. 3). A person commits 'bigamy' who, being already married, goes through the form of marriage with any other person during the life of his or her husband or wife, whether the second (so-called) marriage takes place within the Dominions of His Majesty or elsewhere (Matrimonial Causes Act, 1857, s. 27). 'Cruelty' may be defined as conduct involving 'bodily hurt or injury to health or a reasonable apprehension of one or other of these' (*Evans* v. *Evans* (1790) 1 Hagg. Con., at p. 39; *Tomkins* v. *Tomkins* (1858) 1 Sw. & Tr. 168; *Russell* v. *Russell* [1897] A. C. 395 (see especially *per* Lord Herschell, at p. 456). Thus, (i) menaces of violence (*Hulme* v. *Hulme* (1823) 2 Add. 27); (ii) the wilful communication of a venereal disease (*Brown* v. *Brown* (1865) 1 P. & D. 46), the *onus* of rebutting the presumption of knowledge being on the accused (*Browning* v. *Browning* [1911] P. 161);

(iii) systematic neglect and insult affecting the wife's health (*Kelly* v. *Kelly* (1870) L. R. 1 P. & M. 59; *Bethune* v. *Bethune* [1891] P. 205); (iv) causing of illness by the husband's conviction under the Criminial Law Amendment Act, 1885 (*Thompson* v. *Thompson* (1901) 85 L. T. 172), have been held to amount to cruelty. On the other hand, conduct, however improper, which does not cause physical injury or the apprehension thereof, does not amount to cruelty (*Russell* v. *Russell*, *ubi sup.*). 'Desertion' means cessation of cohabitation, whether actually effected by the guilty party or as the result of his misconduct. Thus, if a husband persistently commits adultery, his wife is justified in leaving him; and he will then be deemed guilty of desertion (*Sickert* v. *Sickert* [1899] P. 278). But, where a wife has obtained, under the Summary Jurisdiction (Married Women) Act, 1895 (*post*, § 1887)), and acted upon, an order absolving her from the duty of cohabiting with her husband, she cannot treat the consequent separation as 'desertion' by her husband for the purposes of this § (*Dodd* v. *Dodd* [1906] P. 189; *Harriman* v. *Harriman* [1909] P. 123).]

Divorce after judicial separation

1875. A wife who has obtained a decree for judicial separation from her husband on the ground of his cruelty, may afterwards obtain a decree for dissolution of marriage on proof of her husband's subsequent adultery.

Bland v. *Bland* (1866) L. R. 1 P. & M. 237.
Green v. *Green* (1873) L. R. 3 P. & M. 121.

[Presumably, the same principle will apply if the judicial separation had been obtained on any other ground, and even though the wife could have obtained a divorce in the first instance (*Green* v. *Green*, *ubi sup.*).]

Absolute bars to divorce

1876. The Court must dismiss any petition for divorce if it finds that —

(i) the petitioner has, during the marriage, been accessory to or conniving at the

adultery of the other party to the marriage; *or*,

(ii) the petitioner has condoned the adultery complained of; *or*,

(iii) the petition is presented or prosecuted in collusion with either of the respondents.

Matrimonial Causes Act, 1857, s. 30.

[The words 'with either of the respondents' are intended to cover the case of a husband's petition, in which the alleged adulterer must (except on special grounds) be made a co-respondent, and the case of a wife's petition, in which the alleged adulteress may be ordered to be made a respondent (Matrimonial Causes Act, 1857, s. 28). 'Condonation' means a complete forgiveness and blotting out of an offence known to the condoner to have been committed, followed by cohabitation. The fact that other offences had been committed by the guilty party, unknown to the condoner, is immaterial; but the condonation does not extend to them (*Bernstein* v. *Bernstein* [1893] P. 292). It seems now to be clearly established, that condonation is conditional upon the proper subsequent observance of the matrimonial relationship, and that a condoned offence is revived by any subsequent matrimonial misconduct. (*Houghton* v. *Houghton* [1903] P. 150; *Copsey* v. *Copsey* [1905] P. 94; *Price* v. *Price* [1911] P. 201).]

Discretionary bars

1877. The Court is not bound to grant a decree for divorce if it finds that the petitioner has been guilty of: —

(i) adultery during the marriage; *or*,

(ii) unreasonable delay in presenting or prosecuting the petition; *or*,

(iii) cruelty towards the other party to the marriage; *or*,

(iv) having deserted or wilfully separated him-

self or herself from the other party before the adultery complained of, without reasonable excuse; *or*,

(v) such wilful neglect or misconduct as has conduced to the adultery.

Matrimonial Causes Act, 1857, s. 31.

[The discretion vested in the Court by s. 31 of the Matrimonial Causes Act, 1857, is unfettered, though judicial (*Constantinidi* v. *Constantinidi* [1903] P., at p. 259; *Brooke* v. *Brooke* [1912] P. 205 n.); and it is not very clear on what principles it will be exercised in favour of a guilty petitioner. Perhaps the most common cases are those in which the adultery of the petitioner (especially a petitioning wife) has been caused, or at least induced, by the conduct of the respondent (*Symons* v. *Symons* [1897] P. 167; *Cleland* v. *Cleland* (1913) 109 L. T. 744). But condonation of the petitioner's offence by the respondent (*Woltereck* v. *Woltereck* [1912] P. 201; *Habra* v. *Habra* [1914] P. 100), the fact that, owing to a mistaken belief as to the circumstances, the petitioner was not aware that he was committing a matrimonial offence (*Joseph* v. *Joseph* (1865) 34 L. J. (P. & M.) 96), and the probable consequences of refusing a decree (*Pretty* v. *Pretty* [1911] P. 83), may, with all other relevant circumstances, be taken into account by the Court.]

Decree nisi *for divorce*

1878. Every decree for divorce is in the first instance a decree *nisi*, not to be made absolute till after the expiration of six months from the pronouncing thereof, unless the Court fixes a shorter time, which must, however, not be less than three months.

Matrimonial Causes Act, 1860, s. 7.
Matrimonial Causes Act, 1866, s. 3.
Watton v. *Watton* (1866) L. R. 1 P. & M. 227. (The power of the Court to fix a time shorter than six months will only be exercised under very special circumstances (*Shelton* v. *Shelton* (1869) 38 L. J. (P. & M.) 34; *Fitzgerald* v. *Fitzgerald* (1874) L, R. 3 P. & M. 136 (period reduced); *Rippingall* v. *Rippingall* (1882) 48 L. T. 126).)

Refusal of decree absolute

1879. Upon cause being shown to the Court by any person (including the King's Proctor) during the period between the pronouncing of the decree *nisi*, and the time when it can be made absolute, the Court may refuse to make absolute a decree *nisi* for divorce, on the ground of collusion, or on the ground that material facts have not been brought before the Court.

Matrimonial Causes Act, 1860, s. 7.
Brooke v. *Brooke* [1912] P. 136, 205 (n).

[*Semble*, The Court may in such circumstances refuse to make the decree absolute, even though, if the facts had been disclosed at first, they would not have prevented the Court from making a decree *nisi* in favour of the petitioner (*Brooke* v. *Brooke*, *ubi sup.*, at pp. 145, 146). In *Roche* v. *Roche* [1905] P. 142, it was held that the decree *nisi* must be rescinded if material facts have been withheld; but this decision was not followed in *Hunter* v. *Hunter* [1905] P. 217, in which case Gorell Barnes, P., expressed the opinion that "facts which are kept back are only material if, when disclosed, the Court would say that, knowing these facts, the Court would not allow the decree" (p. 228). This last opinion was, however, dissented from in *Brooke* v. *Brooke*; and in *Pretty* v. *Pretty* [1911] P. 83, the decree was made absolute, although the petitioner had falsely denied on oath that she had committed adultery. In addition to the power of showing cause mentioned above, the King's Proctor has a power to intervene during the progress of the cause, or at any time before the decree is made absolute, on the ground of collusion only (Matrimonial Causes Act, 1860, s. 7; *Brooke* v. *Brooke*, *ubi sup.*, at p. 141).]

Decree for judicial separation

1880. A husband or wife is entitled, subject to the provisions of this Title, to obtain from the Court a decree of judicial separation, if he or she proves, to the satisfaction of the Court, that the

other party has, since the celebration of the marriage, been guilty of: —

(i) adultery; *or*,

(ii) cruelty; *or*,

(iii) desertion without reasonable cause for two years or upwards, or desertion constituted by the fact of the other party having refused to comply with a decree for restitution of conjugal rights;[a] *or*,

(iv) *Semble*, sodomy or bestiality, or an attempt to commit either of these offences.[b]

(a) Matrimonial Causes Act, 1857, s. 16.
Matrimonial Causes Act, 1884, s. 5.

[Where a wife refuses to allow marital rights, a husband is not guilty of desertion without reasonable cause, if he refuses to live with her (*Synge* v. *Synge* [1900] P. 180).]

(b) Matrimonial Causes Act, 1857, s. 7.
Bromley v. *Bromley* (1793) 2 Add. 158 n.
Mogg v. *Mogg* (1824) *ibid.* 292.

[The doubt in the text arises from the fact that the jurisdiction referred to in (iv) is conferred by the statute by reference to the practice of the old ecclesiastical courts, which practice is obscure, especially as to attempts.]

Absolute bars to judicial separation

1881. The Court must dismiss any petition for judicial separation if it finds that the petitioner has: —

(i) if judicial separation is sought on the ground of adultery, been accessory to or

connived at the adultery of the other party; *or*,

Boulting v. *Boulting* (1864) 3 Sw. & Tr. 329.
Ross v. *Ross* (1869) L. R. 1 P. & M. 734.

(ii) condoned the matrimonial offence complained of; *or*,

Durant v. *Durant* (1825) 1 Hagg. Eccl. 733.

(iii) presented or prosecuted the petition in collusion with the respondent; *or*,

Butler v. *Butler* (1890) 63 L. T. 256.

(iv) committed adultery during the marriage,[a] unless such adultery has been condoned.[b]

(a) *Drummond* v. *Drummond* (1861) 30 L. J. P. & M. 177.
Otway v. *Otway* (1888) 13 P. D. 141.
Gooch v. *Gooch* [1893] P. 99.
(b) *Anichini* v. *Anichini* (1839) 2 Curt. 210.
Seller v. *Seller* (1859) 1 Sw. & Tr. 482.
Gooch v. *Gooch, ubi sup.*, at pp. 105–6, *per* Jeune, P.

[The duty of the Court to refuse a decree of judicial separation on the above grounds is not directly imposed by statute, but arises from the statutory direction to follow the practice of the old ecclesiastical courts (Matrimonial Causes Act, 1857, ss. 7, 22). The curious result appears to be, that, whereas divorce can be granted although the petitioner has been guilty of adultery (see *ante*, § 1877, note), judicial separation cannot, at least unless the adultery has been condoned. For the effect of fresh misconduct, in reviving a condoned offence, see *ante*, § 1876 (note).]

Delay in petition for judicial separation

1882. Delay in presenting a petition for judicial separation is not a ground for dismissing such petition.[a] But lapse of time may be evidence that the suit is not brought *bonâ fide* for the protection of the

petitioner, but for some collateral purpose; in which case the petition will be dismissed.[b]

(a) *Cooke* v. *Cooke* (1863) 3 Sw. & Tr. 246.
(b) *Matthews* v. *Matthews* (1859) 1 Sw. & Tr. 499; 3 Sw. & Tr. 161.

[The above two cases, which appear to be the only ones on the point, were cases of cruelty.]

Misconduct of petitioner

1883. When a petition for judicial separation is presented on the ground of adultery, the fact that the petitioner has been guilty of cruelty [a] or desertion [b] is not a ground for dismissing the petition; unless such cruelty or desertion has conduced to the adultery.[c] But (*semble*) this rule does not apply if the petition is presented on some other ground.[d]

(a) *Dillon* v. *Dillon* (1841) 3 Curt. 86.
(b) *Morgan* v. *Morgan* (1841) 2 Curt. 679.
Duplany v. *Duplany* [1892] P. 53.
Synge v. *Synge* [1900] P., at p. 195, *per* Jeune, P.
(c) *Boreham* v. *Boreham* (1866) L. R. 1 P. & M. 77.
Hodgson v. *Hodgson* [1905] P. 233.
(d) No authority can be found for this statement; but it is believed to represent the practice of the Court. *Quære:* whether the Court is bound to refuse a decree in such cases.

Petitioner conducing to adultery

1884. When a petition for judicial separation is presented on the ground of adultery, the Court may refuse a decree, if it finds that the petitioner has been guilty of conduct conducing to the adultery.

Boreham v. *Boreham* (1866) L. R. 1 P. & M. 77.
Hodgson v. *Hodgson* [1905] P. 233.

Marriage of divorced persons

1885. After a decree absolute for the dissolution of marriage, either party may marry again;[a] but a man may not, during his divorced wife's lifetime, marry her sister.[b] The decree also places the wife in the position of an unmarried woman in respect of property, contract, tort, and capacity to sue and be sued,[c] and relieves the husband from liability for torts committed by the wife, whether before or after the decree.[d]

(a) Matrimonial Causes Act, 1857, s. 57.

[Where there is a right of appeal from the decree, the right to remarry does not arise until the time for appealing has expired, or the appeal has been dismissed (*ibid.*; and Divorce Amendment Act, 1868, s. 4).]

(b) Deceased Wife's Sister's Marriage Act, 1907, s. 3 (2).
(c) *Prole* v. *Soady* (1868) L. R. 3 Ch. App. 220.
Thornley v. *Thornley* [1893] 2 Ch. 229.

[In general the wife's status is changed only as from the date of the decree absolute (*Norman* v. *Villars* (1877) 2 Ex. D. 359; *Sinclair* v. *Fell* [1913] 1 Ch. 155). But in *Prole* v. *Soady*, *ubi sup.*, it was held that the husband's act in reducing the wife's *chose in action* into possession after the decree *nisi*, was ineffectual.]

(d) *Capell* v. *Powell* (1864) 17 C. B. N. S. 743.

Effects of judicial separation

1886. The effect of a decree of judicial separation is to relieve the parties from the duty of cohabitation,[a] and to place the wife, as from the date of the decree, in the position of an unmarried woman with respect to property of every description which she may acquire or which may devolve on her after such decree,[b] whether in her own right or as personal

representative or trustee,[c] and for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding. And her husband is not liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur; except that when, upon a judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he is liable for necessaries supplied for her use.[d]

(a) Matrimonial Causes Act, 1857, s. 16.
(b) *Ibid.*, s. 25. (Since the effect of judicial separation is limited to property acquired after the decree, it does not remove a restraint on anticipation attaching to property acquired before (*Waite* v. *Morland* (1888) 38 Ch. D. 135).)
(c) Matrimonial Causes Act, 1858, s. 7.
(d) Matrimonial Causes Act, 1857, s. 26.

[The husband cannot, after the judicial separation, be made liable for the wife's torts previously committed, even though an action for that purpose was commenced before the decree was pronounced (*Cuenod* v. *Leslie* [1909] 1 K. B. 880).]

Separation order

1887. A wife may obtain from a court of summary jurisdiction an order providing that she be no longer bound to cohabit with her husband, in the following cases: —

(i) if her husband has been summarily convicted of an aggravated assault upon her within the meaning of the Offences against the Person Act, 1861, s. 43; *or*,

(ii) if her husband has been convicted on indictment of an assault upon her, and sentenced to pay a fine of more than five pounds, or to a term of imprisonment of more than two months; *or*,

(iii) if her husband has deserted her; *or*,

(iv) if her husband has been guilty of persistent cruelty to her, or has been guilty of wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and by such cruelty or neglect has caused her to leave, and live separately from him.

Such an order, while in force, has the effect in all respects of a decree of judicial separation on the ground of cruelty.

Summary Jurisdiction (Married Women) Act, 1895, ss. 4, 5 (a).

[No order can be made in favour of a married woman who has committed adultery (*ibid.*, s. 6); and any order will be discharged on proof that the woman has voluntarily resumed cohabitation with her husband, or has committed adultery (*ibid.*, s. 7). The order may also be varied on the application of either party and the production of fresh evidence (*ibid.*).]

Weekly allowance

1888. The Court may also, in the circumstances referred to in § 1887, order that the husband shall pay to the wife personally, or for her use, such weekly sum, not exceeding two pounds, as it shall,

having regard to the means of both parties, consider reasonable.

Ibid., s. 5 (c).

[The amount may be varied on the application of either party, and the production of fresh evidence (*ibid.*, s. 7).]

Protection order

1889. A wife deserted by her husband may apply to a court of summary jurisdiction for an order called a 'protection order'; and the Court may grant such order if satisfied that the wife has been deserted without reasonable cause, and that she is maintaining herself by her own industry or property. The effect of such order is to protect all earnings and property of the wife, acquired since the desertion, from the husband, and all creditors of the husband, and persons claiming under him; and the wife is, during the continuance of the order, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would have been if she had obtained a decree of judicial separation.

Matrimonial Causes Act, 1857, s. 21. (See also Matrimonial Causes Act, 1858, ss. 6–10; Matrimonial Causes Act, 1864, s. 1.) The husband, his creditors, and persons claiming under him, may apply for the discharge of the order (Matrimonial Causes Act, 1857, s. 21; 1864, s. 1).)

[A protection order does not remove a restraint on anticipation attaching to property of the wife acquired before the date of the desertion (*Hill* v. *Cooper* [1893] 2 Q. B. 85).]

Maintenance on divorce or nullity

1890. On a decree for divorce or nullity of marriage, the Court may order that the husband shall, to

the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable; and may, if it thinks fit (in addition or in the alternative), order that the husband shall pay to the wife during their joint lives such monthly or weekly sum for her maintenance and support, as the Court may think reasonable.[a] In case of a decree for divorce, an order may be made even in favour of a guilty wife.[b]

(a) Matrimonial Causes Act, 1907, s. 1, (repealing s. 32 of the M. C. A. 1857, and s. 1 of the M. C. A. 1866) which contains provisions for discharging, modifying, or reviving such order for payment of monthly or weekly sums, or for increasing their amount.

(b) *Bent* v. *Bent* (1861) 2 Sw. & Tr. 392.
Robertson v. *Robertson* (1883) 8 P. D. 94.
Edwards v. *Edwards* [1894] P. 33.
Ashcroft v. *Ashcroft* [1902] P. 270.
Squire v. *Squire* [1905] P. 4.

[The order is sometimes made conditional on the wife remaining unmarried (*Smith* v. *Smith* [1898] P. 29) or unmarried and chaste (*Kettlewell* v. *Kettlewell* [1898] P. 138; *Squire* v. *Squire*, *ubi sup.*). Interim orders for payment of alimony can be made during the pendency of the suit (Matrimonial Causes Act, 1907, s. 1 (3); *Foden* v. *Foden* [1894] P. 307); but only where the wife has no other sufficient means of support (*Bass* v. *Bass* [1915] P. 17). There is no power under the statute for the Court, without the consent of the husband, to order payment of maintenance by him during the life of the wife (*Maidlow* v. *Maidlow* [1914] P. 245).]

Alimony on restitution or judicial separation

1891. When a decree for restitution of conjugal rights or for judicial separation is made, the Court

may order the husband to pay until further order a periodical sum to his wife by way of maintenance or alimony;[a] even if the decree is made in consequence of the wife's misconduct.[b] Not more than one half of the joint income of husband and wife can be allotted as alimony.[c]

(a) Matrimonial Causes Act, 1857, s. 17; 1884, s. 2.
Leslie v. *Leslie* [1911] P. 203.
Tangye v. *Tangye* [1914] P., at p. 208, *per* Evans, P.
(b) *Prichard* v. *Prichard* (1864) 3 Sw. & Tr. 524.
Goodden v. *Goodden* [1892] P. 1.
(c) *Haigh* v. *Haigh* (1869) L. R. 1 P. & M. 709. (Where the wife has not to support children of the marriage, the amount will usually be one third of the joint income (*Cobb* v. *Cobb* [1900] P. 294).)

[Interim orders for payment of alimony to the wife *pendente lite* can be made during the suit; and such alimony may even be continued during the pendency of an appeal by a wife whose petition has been dismissed (*Jones* v. *Jones* (1872) L. R. 2 P. & M. 333).]

Variation of alimony

1892. The Court may make an order increasing, diminishing, or taking away, the amount payable as maintenance or alimony, under a decree for restitution of conjugal rights,[a] or for judicial separation;[b] if it appears that the means of the husband have increased or diminished respectively.

(a) Matrimonial Causes Act, 1884, s. 4.
Cox v. *Cox* (1826) 3 Add. 276.
(b) *Saunders* v. *Saunders* (1858) 1 Sw. & Tr. 72.
Louis v. *Louis* (1866) L. R. 1 P. & M. 230.
Tangye v. *Tangye* [1914] P., at p. 208, *per* Evans, P.

Settlement of guilty wife's property

1893. When a husband has obtained a decree for divorce or judicial separation by reason of his wife's

adultery, the Court may order such settlement as it thinks proper to be made of any property (whether in possession or reversion) to which the wife is entitled, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.

Matrimonial Causes Act, 1857, s. 45.

[Such settlement is valid notwithstanding the coverture of the wife (Matrimonial Causes Act, 1860, s. 6).]

Variation of settlements

1894. When a final decree of divorce or of nullity of marriage is made, the Court may make such order as to the Court shall seem fit with regard to the application, either for the benefit of the children of the marriage or of the parties to the marriage, of property comprised in any ante-nuptial or post-nuptial settlement made on the parties to the marriage.

Matrimonial Causes Act, 1859, s. 5.
Matrimonial Causes Act, 1878, s. 3 (which provides that an order may be made even though there are no children of the marriage).

[Where a wife who had been divorced was still allowed to retain an income under a settlement of her husband's property, the allowance was made subject to a *dum sola et casta* clause (*Ollier* v. *Ollier* [1914] P. 240).]

Damages against co-respondent

1895. A husband may recover damages (to be ascertained by the verdict of a jury) from any person who has committed adultery with his wife; and

the Court may direct in what manner such damages shall be paid and applied, and may direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

Matrimonial Causes Act, 1857, s. 33.

[The claim for such damages may be combined with a petition for dissolution of the marriage, as is usually the case, or with a petition for judicial separation (see *Mason* v. *Mason* (1882) 7 P. D. 233, (1883) 8 P. D. 21), or may form the subject of a petition by itself (*Cox* v. *Cox & Warde* [1906] P. 267). The fact that the co-respondent, at the time of committing the adultery, did not know that the respondent was a married woman, is not a bar to a claim for damages, but may be taken into account in assessing the amount of the damages (*Lord* v. *Lord* [1900] P. 297).]

When damages not recoverable

1896. A claim for such damages as are specified in the last preceding § will be refused on any ground on which a decree for dissolution of the marriage would be refused (*ante*, §§ 1876–1879).

Bernstein v. *Bernstein* [1893] P. 292.
Cox v. *Cox & Warde*, *ubi sup.*

[Such claims are also subject to the same principles, rules, and regulations as the old common law action for criminal conversation (Matrimonial Causes Act, 1857, s. 33). But condonation is now a complete answer to a claim for damages, though it was not before 1857 (*Bernstein* v. *Bernstein*, *ubi sup.*; *Hyman* v. *Hyman* [1904] P. 403).]

Jurisdiction of the Court

1897. The jurisdiction of the Court to entertain a petition for divorce is limited to cases where the

parties are domiciled in England.[a] In cases of petitions for judicial separation or restitution of conjugal rights, and in applications for alimony, it is sufficient if the parties are resident in England at the commencement of the proceedings.[b] In cases of petition for nullity, it is sufficient that the alleged marriage was celebrated in England,[c] or that the respondent is resident in England.[d]

(a) *Shaw* v. *Gould* (1868) L. R. 3 H. L. 55.
Wilson v. *Wilson* (1872) L. R. 2 P. & M. 435.
Le Mesurier v. *Le Mesurier* [1895] A. C. 517 (P. C.).
Bater v. *Bater* [1906] P. 209.
Ogden v. *Ogden* [1908] P., at p. 80.

[*Niboyet* v. *Niboyet* (1878) 4 P. D. 1, must be regarded as overruled on this point. It is not necessary that the co-respondent should be domiciled or even reside in England, or be a British subject (*Rayment* v. *Rayment* [1910] P. 271).]

(b) *Le Mesurier* v. *Le Mesurier*, *ubi sup.*, at p. 531, *per Curiam.*
Armytage v. *Armytage* [1898] P. 178.
De Gasquet James v. *D. of Mecklenburg-Schwerin* [1914] P. 53.
Perrin v. *Perrin* [1914] P. 135.
(c) *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67.
Ogden v. *Ogden* [1908] P., at p. 80, *per Curiam.*
(d) *Roberts* v. *Brennan* [1902] P. 143.

[Where a marriage, celebrated in England, has been declared void, at the request of the husband, or his parents, by the Court of a foreign country in which the husband is domiciled, and the wife's domicile at the date of the marriage was English, the English Court has jurisdiction to entertain a petition for divorce by the wife (*Stathatos* v. *Stathatos* [1913] P. 46; *De Montaigu* v. *De Montaigu* [1913] P. 154). *Semble*, also, a husband cannot, by abandoning his English domicile at the time of deserting his wife, prevent the Court entertaining a petition by her for divorce (*Niboyet* v. *Niboyet* (1878) 4 P. D., at p. 14, *per* Brett, L. J.; *Armytage* v. *Armytage* [1898] P., at p. 185, *per* Gorell Barnes, P.).]

SECTION II

RELATIONS OF CHILDREN, PARENTS, AND GUARDIANS

TITLE I—LEGITIMACY

General rule

1898. A person is legitimate who is the child of parents between whom the relation of marriage existed, either at the time when he was begotten, or at the time when he was born, or at any intervening time.

Co. Litt. 7 b.
Bl. *Comm.* I. 434.
Birtwhistle v. *Vardill* (1840) 6 Bing. N. C. 385.
Gardner v. *Gardner* (1877) L. R. 2 App. Ca. 723.

Legitimation by subsequent marriage

1899. The marriage of the parents of a person born before such marriage does not render such person legitimate, if, at the date of his birth, or at the date of the marriage, the father was domiciled in England.

20 Hen. III (1235) c. 9 (Statute of Merton).
Re Wright's Trusts (1856) 2 K. & J. 595.
Re Grove (1888) 40 Ch. D. 216.

[No means short of an Act of Parliament will make such a person legitimate.]

Rule of father's domicile

1900. The marriage of the parents of a person born before such marriage renders such person legitimate, if the father was, both at the date of the birth and at the date of the marriage, domiciled in a country in which the marriage has, according to the law of that country, the effect of rendering such person legitimate.[a] But a person who is legitimate only by reason of the provisions of this § is not entitled to succeed as heir, or heir of the body, to any real estate in England;[b] nor can any ascendant or collateral relation of his succeed as his heir to real estate in England.[c]

(a) *Munro* v. *Munro* (1840) 7 Cl. & F. 842.
Re Goodman's Trusts (1881) 17 Ch. D. 266.
Re Grove, 40 Ch. D. 216.

[Presumably, a similar rule would apply if the law of the father's domicile treated such child as legitimate on any other ground (*Re Goodman's Trusts*, *ubi sup.*, at p. 297, *per* James, L. J.).]

(b) *Birtwhistle* v. *Vardill* (1835) 2 Cl. & F. 571; (1840) 7 Cl. & F. 895.

[By parity of reasoning, if he were dead, descent could not be traced through him.]

(c) *Re Don's Estate* (1857) 4 Drew. 194.

[*Quære:* whether a person so legitimated can succeed on intestacy to leaseholds in England (see Dicey, *Conflict of Laws*, 2nd edn., p. 489).]

Presumption of legitimacy

1901. The child of any woman is presumed to be the child of any man to whom she was married at any such time as is mentioned in § 1898, *ante*.

Banbury Peerage Case (1811) 1 S. & S. 153.
Gardner v. *Gardner* (1877) L. R. 2 App. Ca. 723.

[It is said by Coke (Co. Litt. 8 a) that when a widow remarries soon after the death of her first husband, and the child is born at such a time that he might have been the child of either husband, he may on coming to years of discretion choose which shall be considered his father.]

Proof of non-access

1902. The presumption stated in § 1901 may be rebutted by proof that, at any time when the child could have been begotten, (i) the father was absent from England,[a] *or* (ii) he was impotent,[b] *or* (iii) the parents had no opportunity of sexual intercourse,[c] *or* (iv) it is highly improbable that such intercourse took place.[d] But direct evidence of the husband or wife that such intercourse did not take place during the marriage is not admissible to rebut the presumption.[e]

(a) Co. Litt. 244.

[Presumably it is implied that the mother remained in England.]

(b) *Banbury Peerage Case* (1811) 1 S. & S. 153.
(c) *Hawes* v. *Draeger* (1883) 23 Ch. D. 173.
Burnaby v. *Baillie* (1889) 42 Ch. D. 482.
(d) *Morris* v. *Davies* (1836) 5 Cl. & F. 163.
Bosvile v. *A.-G.* (1887) 12 P. D. 177.
Poulett Peerage Case [1903] A. C. 395.
(e) *R.* v. *Sourton* (1836) 5 A. & E. 180.
Aylesford Peerage Case (1885) L. R. 11 App. Ca., at p. 9, *per* Lord Selborne.
Burnaby v. *Baillie* (1889) 42 Ch. D., at p. 294.

[The last rule does not apply to evidence as to intercourse before marriage (*Poulett Peerage Case*, *ubi sup.*).]

Period of gestation

1903. The duration of the period of gestation is a question of fact in each case.

Alsop v. *Bowtrell* (1619) Cro. Jac. 541.
Bosvile v. *A.-G.* (1887) 12 P. D. 177.
Burnaby v. *Baillie* (1889) 42 Ch. D. 482.

Declaration of legitimacy

1904. Any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal property situate in England, may petition the Court for a decree declaring all or any of the following matters: —

(i) that the petitioner is the legitimate child of his parents;

(ii) that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage;

(iii) that the petitioner's marriage is a valid marriage.

Any decree made by the Court on such petition (whether for or against such legitimacy or validity), is binding on the Crown and on all other persons; except that —

(i) it does not prejudice any person unless such person has been cited or made a party to the proceedings, or is the heir at law or next of kin or other real or personal repre-

sentative of a person so cited or made a party, or derives title under or through such person;

(ii) it does not prejudice any person if it is subsequently proved to have been obtained by fraud or collusion.

Legitimacy Declaration Act, 1858, ss. 1, 8.

[A copy of every petition must be served upon the Attorney-General, who thereupon becomes a respondent (*ibid.*, s. 6).]

TITLE II — DUTIES OF MAINTENANCE AND EDUCATION

Maintenance of children and grandchildren

1905. Subject to § 1908, the father, mother, grandfather, and grandmother, of any person are bound to provide, so far as they are able, necessary maintenance for such person.

Poor Relief Act, 1601, s. 7.

Maintenance of wife's children

1906. Subject to § 1908, the husband of any woman is bound to provide necessary maintenance for her children (whether legitimate or illegitimate) born before his marriage to such woman, until they attain the age of sixteen years, or until the death of the mother, whichever first happens.

Poor Law Amendment Act, 1834, s. 57.

[But not for her grandchildren (*Draper* v. *Glenfield* (1631) 2 Bulstr. 345); unless he acquired property by marriage with the woman (*Westminster* v. *Gerrard* (1632) *ibid.*, 346).]

Maintenance of parents

1907. Subject to § 1908, every person is bound to provide necessary maintenance for his father and mother.

Poor Relief Act, 1601, s. 7.

[The liabilities of maintenance imposed by §§ 1905–7 cannot be directly enforced by civil action; but a failure to discharge

them, which leaves the persons who ought to be provided for, chargeable to the Poor Law authorities, may be punished summarily (Vagrancy Act, 1824, s. 3). And the Poor Law authorities have power to seize the property of any father or mother liable under § 1905, in order to defray the cost of relief provided for the children by them (Poor Relief Act, 1718, s. 1).]

Limits of liability.

1908. The provisions of §§ 1905–7 impose no liability on any person to provide maintenance who is not able to do so out of his own property or by means of his labour; nor do they impose any liability in favour of any person who is able to maintain himself.

Poor Relief Act, 1601, s. 7.

[The words in the Act referring to the persons liable are: 'being of sufficient ability.' As to the interpretation of these words, see *Coulson* v. *Davidson* (1907) 96 L. T. 20.]

Liability of married woman

1909. The provisions of §§ 1905–7 impose no liability on any married woman;[a] except that: —

(i) if poor relief is given to the children of any woman whose husband is beyond the seas, or in custody of the law, or confined in a licensed house or asylum as a lunatic or idiot,[b] or who is living separate from her husband,[c] it is to be given upon the same conditions as if she were a widow;

(ii) a married woman having separate estate is subject to the same liability for the main-

tenance of her children and grandchildren as her husband is subject to for the maintenance of her children or grandchildren (*ante*, § 1906),[d] and is liable to provide maintenance for her parents, in the same manner as if she were unmarried.[e]

(a) *Custodes* v. *Ginkes* (1651) Style, 283.
Coleman v. *Birmingham* (1881) 6 Q. B. D. 615.
(b) Poor Law Amendment Act, 1844, s. 25.
(c) Divided Parishes and Poor Law Amendment Act, 1876, s. 18.

[Of course, a widow is liable as a 'mother' under s. 6 of the Act of 1601 (see *ante*, § 1905).]

(d) Married Women's Property Act, 1882, s. 21. (But this provision does not relieve the husband of his liability to maintain her children and grandchildren.)
(e) Married Women's Property Act, 1908, s. 1.

[The liability of the married woman is not expressly limited by the Acts to her separate estate. *Quære:* as to the proper construction.]

Maintenance of illegitimate children

1910. The provisions of §§ 1905–7 do not (except where expressly mentioned) impose any liability to provide maintenance for illegitimate children or grandchildren.[a] But the mother of an illegitimate child is bound to provide necessary maintenance for such child till it attains the age of sixteen, or, being a female, marries under that age;[b] and the father of an illegitimate child may be compelled to make a contribution (not exceeding five shillings a week) to the mother or other person having custody of the child, for the purpose of maintain-

ing of such child until the child attains the age of thirteen.[c] (*Semble*) this liability exists, even though the child was born out of the jurisdiction; unless it is proved that the status of the child is governed by foreign law.[d]

(a) *Westminster* v. *Gerrard* (1632) 2 Bulstr. 346.

[But see *R.* v. *Reeve* (1631) *ibid.*, 344.]

(b) Poor Law Amendment Act, 1834, s. 71.
(c) Bastardy Laws Amendment Act, 1872, ss. 4, 5.
Bastardy Laws Amendment Act, 1873, s. 5.
Divided Parishes and Poor Law Amendment Act, 1876, s. 24.
Affiliation Orders Act, 1914, s. 3.
(d) *R.* v. *Humphreys* [1914] 3 K. B. 1237.

[The application for compelling such contribution must be made to the Justices of the Peace at Petty Sessions; and the evidence of the mother as to the paternity requires corroboration in some material particular (*Cole* v. *Manning* (1877) 2 Q. B. D. 611). In some cases the Justices may order the contribution to continue until the child attains the age of sixteen (Bastardy Laws Amendment Act, 1872, s. 5); and the payments are not, as a rule, now to be made directly to the mother or person having custody of the child, but to a collector appointed by the Court (Affiliation Orders Act, 1914, s. 1). There appears to be no authority for the proposition that an illegitimate child is under any liability to provide maintenance for its parents.]

Liability for education of children

1911. It is the duty of the parent, guardian, and every person who is liable to maintain, or has the custody of, any child between the ages of five and fourteen years, to cause it to receive efficient elementary instruction in reading, writing, and arithmetic.

Education Act, 1870, s. 3.
Education Act, 1876, ss. 4, 48.

[This duty cannot be made the subject of civil proceedings. But if, in the case of a child over the age of five years, the duty is neglected habitually or without reasonable excuse, the local education authority must take proceedings to obtain from a court of summary jurisdiction an order for the child to attend 'some certified efficient school' ('attendance order'), which will be enforced by means of a fine (Education Act, 1876, s. 11; Education (Administrative Provisions) Act, 1907, s. 14). In the case of a blind, deaf, or defective or epileptic child, the period of compulsory education extends to sixteen years (Elementary Education (Blind and Deaf Children) Act, 1893, s. 11; Elementary Education (Defective and Epileptic Children) Act, 1899, s. 11). Total or partial exemption from liability is given in the case of normal children above the age of twelve years, if they have reached a specified standard of education, and under certain other conditions (Elementary Education Act, 1870, s. 74; Elementary Education (School Attendance) Act, 1893, s. 1; Elementary Education (School Attendance) Act, 1893, Amendment Act, 1899, s. 1). The children of neglectful, drunken, and criminal parents may be sent by the Court to a certified industrial school (Children Act, 1908, s. 58 (1)); and parents, or other persons liable for the maintenance of such children, must, if they are able, contribute to their maintenance therein (*ibid.*, s. 75 (1)).]

NOTE

It will be observed that English law imposes no directly enforceable duty to provide more than the bare necessities of life, and mere elementary education, for children (cf. *Wellesley* v. *Beaufort* (1827) 2 Russ., at p. 23). The duty of a father to provide such further maintenance and education for his children as may be suitable to their station in life is, however, recognized, in the sense that the Court will not order the property of an infant to be applied for his maintenance and education in exoneration of the father, when the father has sufficient means to make suitable provision (*Andrews* v. *Partington* (1790) 2 Cox, Eq. 223; *Re Allan* (1881) 17 Ch. D. 807). The mother, whether during the life or after the death of the father, is not regarded as being under a similar obligation (*Haley* v. *Bannister* (1819) 4 Madd. 275; *Douglas* v. *Andrews* (1849) 12 Beav. 310).

TITLE III — CUSTODY AND GUARDIANSHIP OF MINORS

Father as guardian

1912. Subject to the provisions of this Title, the father of a minor is the sole legal guardian of such minor.

Ex parte Hopkins (1732) 3 P. Wms., at p. 154, *per* Lord King, C.
Wellesley v. *Beaufort* (1827) 2 Russ. 21; 2 Bligh (N. S.) 124.
Re Agar Ellis (1883) 24 Ch. D. 317.

[*Quære:* Does this right exist in the case of a married daughter?]

Mother as guardian

1913. After the death of the father of a minor, the mother is entitled to the custody of such minor,[a] and is guardian of such child jointly with any guardian appointed by the father by deed or will, or with any guardian appointed by the Court in default of a guardian appointed by the father.[b]

(a) *Villareal* v. *Mellish* (1737) 2 Swans. 533.
Mendes v. *Mendes* (1748) 3 Atk., at p. 624.
R. v. *Clarke* (1857) 7 E. & B. 186.

[As to the extent of this custody, see *post*, §§ 1932–1936.]

(b) Guardianship of Infants Act, 1886, s. 2. (Before this Act the mother's right of custody was subject to the power of any guardian appointed by the father (*Talbot* v. *Shrewsbury* (1840) 4 My. & Cr. 672).)

Illegitimate child

1914. The mother of an illegitimate minor is *primâ facie* entitled to the custody of such minor.

R. v. *Nash* (1883) 10 Q. B. D. 454.
Barnardo v. *McHugh* [1891] A. C. 388.
Humphreys v. *Polak* [1901] 2 K. B. 385.
R. v. *New* (1904) XX T. L. R. 583.

[The rights of the mother of an illegitimate child are said to be not identical with those of the father of a legitimate child (*Bernardo* v. *McHugh*, *ubi sup.*, at p. 394).]

Reputed father

1915. After the death of the mother, the reputed father is *primâ facie* entitled to the custody of an illegitimate minor.

Ord v. *Blackett* (1725) 9 Mod. 116.
In re Kerr (1889) 24 L. R. (Ir.) 59.

[The Court has even, after the death of the reputed father of an illegitimate minor, appointed persons nominated in his testament as guardians of the minor (*Ward* v. *St. Paul* (1789) 2 Bro. C. C. 583; *Peckham* v. *Peckham* (1788) *ibid.*, p. 584 n.).]

Agreements as to custody of minors

1916. No agreement by which a father of a minor,[a] or the mother of an illegitimate minor,[b] agrees to give up, or not to resume, the guardianship, custody, or control of such minor, is binding; except an agreement contained in a separation deed to the effect that the father shall give up such custody or control to the mother. And such last mentioned agreement will not be enforced by the Court, if the Court is of opinion that it will not be for the minor's benefit to enforce it.[c]

(a) *Reg.* v. *Smith* (1853) 22 L. J. (Q. B.) 116.
Andrews v. *Salt* (1873) L. R. 8 Ch. App. 622.
R. v. *Barnardo* (1889) 23 Q. B. D. 305.
(b) *Humphreys* v. *Polak* [1901] 2 K. B. 385.
(c) Custody of Infants Act, 1873, s. 2.

[Any condition having the object of depriving a parent of the custody of a child is void (*Re Sandbrook* [1912] 2 Ch. 471)].

Custody during father's lifetime

1917. The Court may, on the application of the mother of a minor, make such order as it may think fit with regard to the custody of such minor, and the access thereto of either parent, having regard to the welfare of the minor and to the conduct and wishes of either parent.

Guardianship of Infants Act, 1886, s. 5.
Re A. and B. [1897] 1 Ch. 786.

Guardian in socage

1918. If a minor is entitled by inheritance[(a)] to the legal estate[(b)] in any land of socage tenure, his nearest blood relation to whom the land cannot descend is his guardian in socage until such minor attains the age of fourteen years,[(c)] or, if the land is subject to the custom of gavelkind, until the minor attains the age of fifteen years.[(d)] The powers of such guardian are displaced by the existence of any guardian appointed by the deed or will of the father or mother.[(e)]

(a) *Quadring* v. *Downs* (1677) 2 Mod. 176.
(b) *R.* v. *Toddington* (1818) 1 B. & Ald. 560.
(c) Litt. s. 123.
Bac. Ab. *Guardian*, A. 1.
Bedell v. *Constable* (1669) Vaugh. 177.
(d) Lambarde, *Perambulation of Kent* (ed. 1596) p. 563.
(e) 12 Car. II (1660) c. 24, s. 8.
Guardianship of Infants Act, 1886, ss. 3, 4.

[It is said that a minor having socage lands may, after attaining the age of fourteen, elect a guardian for himself, if there is no other guardian, and that in certain cases even a minor under the age of fourteen may make such an election (Co. Litt. 88; *Ex parte Edwards* (1747) 3 Atk. 519; *Anon.* (1751) 2 Ves. Sen. 374, *per* Lord Hardwicke, C.). But the law on this point is practically obsolete; for such a guardian, even if appointed, will not oust the jurisdiction of the Court to appoint a guardian (*Ex parte Watkins* (1752) 2 Ves. Sen. 470; *Curtis* v. *Rippon* (1819) 4 Madd. 462). Equally obsolete is the law relating to 'guardianship by nature,' which was said to belong to the father in respect of his heir apparent or heiress presumptive, and 'guardianship for nurture,' which was said to belong to the father and, after his death, to the mother in respect of any child, and to last till such child attained the age of fourteen (see Co. Litt. 88 b; *Ratcliff's Case* (1592) 3 Rep. 37 b). These last mentioned forms of guardianship may now be regarded as merged in the parental right of custody and control (*Re Agar-Ellis* (1883) 24 Ch. D. 317). There may also be, or might formerly have been, a guardian by local custom of infant tenants of copyhold land (*Egleton's Case* (1599) 2 Roll. Ab. 40; *Church* v. *Cudmore* (1691) 2 Lutw. 1181); or of infants whose fathers died in certain cities or boroughs (12 Car. II (1660) c. 24, s. 10; *Wilkinson* v. *Boulton* (1665) 1 Lev. 162; *Frederick* v. *Frederick* (1721) 1 P. Wms. 710).]

Statute of 1660

1919. The father of a child may by deed or will appoint a guardian or guardians for such child, to act after the father's death during such time as the child is a minor, if the child is unmarried at the death of the father.

12 Car. II (1660) c. 24, s. 8.

[The marriage of a male minor after the death of the father does not put an end to the guardianship (*Eyre* v. *Shaftesbury* (1723) 2 P. Wms. 102; *Roach* v. *Garran* (1748) 1 Ves. Sen. 157, 159). It is said that the marriage of a female minor puts an end to the guardianship (*Mendes* v. *Mendes* (1747) 1 Ves. Sen. at p. 91; but see *Re Sampson and Wall* (1884) 25 Ch. D., at p. 491). *Semble*, the statute refers to legitimate relationship only.]

1920. The mother of a minor may appoint by deed or will a guardian or guardians for such minor, to act after the death of the father and mother, if the child is unmarried at that date, but jointly with any guardian appointed by the father. *Statute of 1886*

Guardianship of Infants Act, 1886, s. 3 (i).

[Before the Act of 1886, it was held that a mother had no power to appoint a guardian by will (*Ex parte Edwards* (1747) 3 Atk. 519). *Semble*, the Act of 1886 refers to legitimate relationship only.]

1921. The mother of a minor may provisionally nominate by deed or will a guardian or guardians to act jointly with the father. And the Court may, after her death, if it be shown to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, confirm the appointment; and such guardian or guardians will thereupon be authorized and empowered so to act. Or the Court may make such other order in respect of the guardianship as it shall think right. *Provisional nomination by mother*

Guardianship of Infants Act, 1886, s. 3 (2).

1922. The Court has power to appoint a guardian for any minor, whether such minor is entitled to property or not. *Appointment by Court*

Re Spence (1847) 2 Ph. 247.
Re McGrath [1893] 1 Ch. 143.

[The court does not however commonly appoint a guardian in the absence of any property to which the infant is entitled; because

in such a case the court cannot provide a scheme for the infant's maintenance and education (*Re McGrath*, *ubi sup.*, at p. 147). Nor, *semble*, will the Court appoint a guardian if a proper guardian appointed by the father or mother is in existence, or, *à fortiori*, if the father himself is a proper person and able to act. For the special statutory power of the Court to appoint a guardian to act with the mother where there is no fit guardian appointed by the father, see *ante*, § 1913.]

Removal of custody from guardian

1923. The Court has power to take away the custody and control of a minor from any guardian or person (including the father) and to commit such control and custody to some other person, when such a course is for the benefit of the minor.

Shelley v. *Westbrook* (1817) Jacob, 266.
Wellesley v. *Beaufort* (1827) 2 Russ. 1; 2 Bligh (N. S.) 124.
Re Fynn (1848) 2 De G. & S. 457.
Re Besant (1879) 11 Ch. D. 508.
Re Agar-Ellis (1883) 24 Ch. D., at p. 338.
R. v. *Gyngall* [1893] 2 Q. B. 232.

[This power is ordinarily exercised by the High Court in the Chancery Division; but it may be exercised by any division (*R.* v. *Gyngall*, *ubi sup.*).]

Removal of guardian

1924. The Court may in its discretion, on being satisfied that it is for the welfare of the minor, remove from the office of guardian: —

(i) a guardian appointed by testament or the mother's deed;

(ii) a guardian appointed by the Court to act jointly with the mother (*ante*, § 1913);

(iii) the mother;

(iv) a guardian appointed by the Court in place of any of the foregoing;

and may, if it deems it to be for the welfare of the minor, appoint another guardian in place of the guardian so removed.

Guardianship of Infants Act, 1886, ss. 2, 6.

[It is not necessary that the guardian should have been guilty of misconduct, at any rate where the Court is acting on its statutory powers (*F.* v. *F.* [1902] 1 Ch. 688). And it is said that, independently of statute, the Court has power to remove any guardian, if the interests of the minor require such a course (*Re McGrath* [1893] 1 Ch., at p. 147, *per Curiam*).]

Custody of minors under matrimonial jurisdiction

1925. After a decree, or pending proceedings, for nullity, divorce, judicial separation, or the restitution of conjugal rights, the Court may make an order for the custody, maintenance, and education of the children of the marriage, being minors, or for placing them under the protection of the Chancery Division.

Matrimonial Causes Act, 1857, s. 35.
Matrimonial Causes Act, 1859, s. 4.
Matrimonial Causes Act, 1884, s. 6.

[In cases of decrees for restitution of conjugal rights, the order can only be made if the respondent refuses to obey the decree (Matrimonial Causes Act, 1884, s. 6).]

Power of Court on divorce or judicial separation

1926. Where a decree, *nisi* or absolute, for divorce, or a decree for judicial separation, has been pronounced, the Court may declare the parent by

reason of whose misconduct such decree was made to be unfit to have the custody of the children (if any) of the marriage; and thereupon, such parent will not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children.

Guardianship of Infants Act, 1886, s. 7.

Custody of infant felon

1927. Where a minor has been convicted of felony, the Chancery Division of the High Court may, upon the application of any person willing to take charge of him and provide for his maintenance and education, assign the custody of him for any period of his minority to such person.

Infant Felons Act, 1840, s. 1.

[Such order suspends the rights as to power and control over the minor of any testamentary or natural guardian (*ibid.*).]

Special case of female minors

1928. Where, on the trial of any offence under the Criminal Law Amendment Act, 1885, it is proved that the seduction or prostitution of a girl under the age of sixteen years has been caused, encouraged, or favored by her father, mother, guardian, master, or mistress, the Court may divest such person of all authority over her, and appoint any person willing to take charge of the girl to be her guardian until she has attained the age of twenty-

one years, or such age below twenty-one as the Court may direct. And the High Court may from time to time rescind or vary such order by the appointment of any other person as guardian or otherwise.

Criminal Law Amendment Act, 1885, s. 12.

Offences against children

1929. Where a person having the custody, charge, or care of a child or young person, has been convicted of committing in respect of such child or young person any of certain offences specified in the Children Act, 1908, or has been committed for trial in respect of such offence, or has been bound over to keep the peace towards such child or young person by any Court, that Court may, then or subsequently, and any Petty Sessional Court may subsequently, order that such child or young person be taken out of the custody, charge, or care of the person so convicted, committed for trial, or bound over, and be committed to the care of a relative of such child or young person, or some other fit person named by the Court, until such child attains the age of sixteen years, or for any shorter period. And the Court, or any court of like jurisdiction, may vary or rescind any such order.

Children Act, 1908, s. 21 (1).

[If the child has a parent or legal guardian, no order is to be made unless such parent or guardian is convicted of or committed for trial for the offence, or is under committal for trial for having

been, or is proved to have been, party or privy to the offence, or has been bound over to keep the peace towards the child or young person, or cannot be found (*ibid.*, s. 21 (2)). If an order is made in respect of a person committed for trial, and that person is acquitted, or the charge is dismissed for want of prosecution, the order becomes void, except with regard to anything which has been lawfully done under it (*ibid.*, s. 21 (4)).]

Disclaimer, &c., of by one testamentary guardian

1930. If several guardians are appointed by a testament for the same person, and one or more disclaims the guardianship, or dies, the other or others remain guardians.

Eyre v. *Shaftesbury* (1723) 2 P. Wms. 102.

[Presumably a similar rule would apply to a guardian appointed by deed.]

Death of one guardian

1931. If several guardians are appointed by the Court, the death of one terminates the guardianship of all;[a] but the Court will usually reappoint the survivors as a matter of course.[b]

(a) *Bradshaw* v. *Bradshaw* (1826) 1 Russ. 528.
(b) *Hall* v. *Jones* (1827) 2 Sim. 41.

Powers of guardian

1932. A father or other person having the lawful custody of a minor, has the right to restrain to a reasonable extent the acts and conduct of such minor, to determine the method of his education and maintenance,[a] and to inflict corporal or other punishment to a reasonable extent upon him;[b] and he may

delegate these rights to a tutor, schoolmaster, or similar person.[c]

(a) *Re Agar-Ellis* (1883) 24 Ch. D. 317.

[The decision in this case shows that the powers of a father are greater in this direction than those of a testamentary guardian, or a guardian appointed by the Court, and will be less readily interfered with by the Court.]

(b) *R.* v. *Hopley* (1860) 2 F. & F., at pp. 206, 207.
(c) *Ex parte McClellan* (1831) 1 Dow. 81.
R. v. *Hopley, ubi sup.*
Fitzgerald v. *Northcote* (1865) 4 F. & F. 656.
Cleary v. *Booth* [1893] 1 Q. B. 465.
Mansell v. *Griffin* [1908] 1 K. B. 161, 947.

[The cases usually speak of a 'father' or 'parent,' and do not mention the rights of a guardian. In *R.* v. *New* (1904) XX T. L. R. 583, it was held that the wishes of the mother of an illegitimate child with regard to its being placed in an institution ought to prevail).]

Remedies for interference

1933. Subject to §§ 1917, 1923, 1924, 1925, *ante*, and §§ 1934–1936, *post*, when the custody of an infant is unlawfully withheld from its father[a] or guardian,[b] the father or guardian may obtain restoration of the custody by means of a writ of Habeas Corpus, or by application to the Chancery Division.[c]

(a) *R.* v. *Greenhill* (1836) 4 A. & E. 624.
R. v. *Howes* (1860) 3 E. & E. 332.
R. v. *Barnardo* (1889) 23 Q. B. D. 305.
(b) 12 Car. II (1660) c. 24, s. 8.
R. v. *Isley* (1836) 5 A. & E. 441.
Re Andrews (1873) L. R. 8 Q. B. 153.
(c) *R.* v. *Isley, ubi sup.*
Re Spence (1847) 2 Ph. 247.

[It is uncertain whether a father or guardian may use force in order to resume control over a child. In *R.* v. *De Manneville*

(1804) 5 East, 221, the Court refused to interfere with the father's control of a child of very tender years; although it was alleged that he had taken it by force and stratagem from the mother. In *Ex parte Hopkins* (1732) 3 P. Wms. 152, the Court declared that the father was entitled to the guardianship of his children, and intimated that "if he can in any way gain them, he is at liberty to do so, provided no breach of the peace be made in such an attempt; but the children must not be taken away by him in returning from, any more than coming to, this Court." In *Gilbert* v. *Schwenk* (1845) 14 M. & W. 488, it was held that one testamentary guardian was not justified in forcibly removing the ward from the custody of the other.]

Choice by minor

1934. The Court will not compel a minor of years of discretion to return to the custody of its father [a] or guardian [b] against its will; if the minor's welfare does not require that it should be so compelled.

(a) *Ex parte Hopkins* (1732) 3 P. Wms. 152.
R. v. *Howes* (1860) 3 E. & E., at pp. 336, 337.
Re Agar-Ellis (1833) 24 Ch. D. 317, at pp. 326, 331, 335, 337.
Re McGrath [1893] 1 Ch. 143, 150.
(b) *Storke* v. *Storke* (1730) 3 P. Wms., at p. 52.

[The age of discretion is considered to be fourteen years in a boy, sixteen in a girl (*R.* v. *Howes*, *ubi sup.*; *Re Agar-Ellis*, *ubi sup.*, at p. 326).]

Discretion of Court

1935. When the parent of a child applies to the High Court for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child,

the Court may in its discretion decline to issue the writ or make the order.

Custody of Children Act, 1891, s. 1.

[As to the meaning of the word 'parent' in this §, see note to next §.]

Desertion by parent

1936. Where a parent has —

(i) abandoned or deserted his child; *or*

(ii) allowed his child to be brought up by another person at that person's expense, or by the Guardians of a Poor Law Union, for such a length of time, and under such circumstances, as to satisfy the Court that the parent was unmindful of his parental duties;

the Court may not make an order for the delivery of the child to the parent; unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child.

Custody of Children Act, 1891, s. 3.

[In §§ 1935, 1936, 'parent' includes any person at law liable to maintain the child, or entitled to the custody of the child (Custody of Children Act, 1891, s. 5).]

Choice of religion

1937. A father has, subject to § 1939, *post*, the right to determine the religion in which his minor children shall be brought up;[a] and any contract

whereby he purports to give up such right is void.[b] And, even where the Court refuses to give a parent the custody of a child, it may order that the child shall be brought up in the religion in which the parent has a legal right to require the child to be brought up.[c]

(a) *D'Alton* v. *D'Alton* (1878) 4 P. D. 87.
Re Agar-Ellis (1878) 10 Ch. D. 49.
Re Scanlan (1888) 40 Ch. D. 200.
(b) *Re Boreham* (1853) 22 L. J. (Q. B.) 116.
Andrews v. *Salt* (1873) L. R. 8 Ch. App. 622.
Re Nevin [1891] 2 Ch. 299.
(c) Custody of Infants Act, 1891, s. 4.

[Here again the word 'parent' has the wide meaning expressed in § 1936 (note). But *quære* whether any one but the father has a legal right to determine the religion of a child.]

Father's choice after his death

1938. After the death of the father, the Court will, subject to § 1939, *post*, order a minor to be brought up in the religion in which the father has directed the minor to be brought up; and, if the father has left no directions, in the religion to which the father belonged at the time of his death.

Re Austin (1865) 34 L. J. (Ch.) 499.
Re Newbery (1866) L. R. 1 Ch. App. 263.
Hawkesworth v. *Hawkesworth* (1871) L. R. 6 Ch. App. 538.

[The Guardianship of Infants Act, 1886, s. 2 (which makes the mother guardian after the death of the father) has not altered this rule (*Re Scanlan*, *ubi sup.*).]

Discretion of Court

1939. Notwithstanding §§ 1937 and 1938, the Court will refuse to interfere for the purpose of hav-

ing a minor educated in the religion of its father, if it considers that such interference would be prejudicial to the interests of the minor.

Andrews v. *Salt* (1873) L. R. 8 Ch. App. 622.
Re Nevin [1891] 2 Ch. 299.
Re Newton [1896] 1 Ch. 740.

[The fact that the child has absorbed the principles of one form of religion, will be a strong ground for refusing to order it to be educated in some other form of religion. But a very strong case must be made out to induce the Court to override the wishes of the father during his lifetime; and this has only been done where the father has by his conduct abandoned his right to have the child brought up in his own religion (see *Re Agar-Ellis* (1878) 10 Ch. D. 49; *Re Newton*, *ubi sup.*).]

Disagreement of guardians

1940. In the event of guardians being unable to agree upon a question affecting the welfare of a minor, any of them may apply to the Court for its direction; and the Court may make such order or orders regarding the matters in difference as it shall think proper.

Guardianship of Infants Act, 1886, s. 3 (3).

Wards of Court

1941. By the institution of a suit in the Chancery Division relating to the person or property of a minor, such minor becomes a ward of Court;[a] and any unauthorized interference with the control or custody of such minor,[b] or unauthorized removal of such minor out of the jurisdiction of the Court,[c] or marriage of such minor without the consent of the

Court,[d] is a contempt of Court punishable with imprisonment.

(a) *De Pereda* v. *De Mancha* (1881) 19 Ch. D. 451.

[*Semble*, the rule does not apply to an alien minor domiciled abroad (*Brown* v. *Collins* (1883) 25 Ch. D. 56).]

(b) *Wellesley* v. *Duke of Beaufort* (1831) 2 R. & M. 639.
(c) *Harrison* v. *Goodall* (1852) Kay, 310 n.
(d) *Herbert's Case* (1731) 3 P. Wms. 116.
Re Martindale [1894] 3 Ch. 193.
Re H.'s Settlement [1909] 2 Ch. 260.

[It is a common practice, for the purpose of making a minor a ward of Court, to settle a small sum of money upon trust for the minor, and to take proceedings immediately for the administration of the trusts of the settlement (see *Re H.'s Settlement*, *ubi sup.*). But it would appear to be sufficient if property under the control of the Court is carried to the separate account of the minor (*De Pereda* v. *De Mancha*, *ubi sup.*).]

Legal proceedings by and against minors

1942. A minor being a plaintiff in any action must be represented by a next friend of full legal capacity; and a minor being a defendant or respondent, by a guardian *ad litem*.

R. S. C., O. XVI, rr. 16, 18, 19.

TITLE IV — POWERS OF PARENTS AND GUARDIANS IN RELATION TO THE PROPERTY OF MINORS

Real estate of minor

1943. The guardian in socage[a] and the testamentary guardian[b] of a minor are entitled to the possession and control of freehold and copyhold[c] lands legally vested in the minor, and to the receipt of the rents and profits thereof,[d] and may bring actions in their own names for the protection and recovery of such lands.[e]

(a) Co. Litt. 88 b.
Goodtitle d. *Newman* v. *Newman* (1774) 3 Wils. 316.
R. v. *Wilby* (1814) 2 M. & S. 504.
R. v. *Sutton* (1835) 3 A. & E., at pp. 612, 613.
(b) 12 Car. II (1660) c. 24, s. 9.
Helyar v. *Beckett* [1902] 1 Ch. 391.
(c) *R.* v. *Wilby*, *ubi sup.*

[But, as regards copyhold lands, the guardian in socage and the testamentary guardian would be displaced by the guardian entitled according to the custom of the manor, if any (*Clench* v. *Cudmore* (1694) 3 Lev. 395).]

(d) *Palmer* v. *Danby* (1701) 1 Eq. Ca. Ab. 261.
(e) *Eyre* v. *Shaftesbury* (1722) 2 P. Wms., at p. 122.
R. v. *Oakley* (1809) 10 East, 491.

Guardian appointed by Court

1944. A guardian appointed by the Court has no power over the ward's property except such as may be entrusted to him by the Court.

R. v. *Sutton* (1835) 3 A. & E. 608.
Re Bond (1846) 11 Jur. 114.
Rimington v. *Hartley* (1880) 14 Ch. D. 630.
Re Willoughby (1885) 30 Ch. D. 324.

[This seems to be implied in these cases, though there is no very precise statement to this effect.]

Parents

1945. A father or mother is not, as such, entitled to any control over, or to any legal interest in, the lands of his child being a minor.

R. v. *Sherrington* (1832) 3 B. & Ad. 714.

Leases by guardian in socage

1946. A guardian in socage may grant a lease of the ward's lands to endure till the ward attains the age of fourteen years.

Eyre v. *Shaftesbury* (1722) 2 P. Wms. 122.
R. v. *Oakley* (1809) 10 East, 491.
R. v. *Sutton* (1835) 3 A. & E., at p. 613, *per* Lord Denman, C. J.

Leases by testamentary guardian

1947. A testamentary guardian may grant a lease of the ward's lands to endure till the ward attains the age of twenty-one years.

Roe v. *Hodgson* (1760) 2 Wils. 129.
Shaw v. *Shaw* (1788) Vern. & Scriv. 607 (Ireland).

[If a guardian in socage or a testamentary guardian purports to grant a lease to endure beyond the period for which a valid lease might have been made, it is uncertain whether such lease is voidable at the option of the ward on attaining full age, or is void *ab initio* (Bac. Ab. *Lease* I. 9; *Guardian G*; *Roe* v. *Hodgson*, *ubi sup.*).]

[In practice, dispositions by way of lease or sale, or otherwise, of the land of a minor are made under the powers of the Settled Land Acts 1882–1890, or (more rarely) of the Settled Estates Act, 1877 (see *ante*, Bk. III, Sect. VII, Tit. I, § 1504); and the management of the land of minors is carried out by trustees under the provisions of the Conveyancing Act, 1881, s. 42, and the Conveyancing Act, 1911, s. 14 (*ante*, Bk. III, Sect. VII, Tit. I, § 1505). The Infant's Property Act, 1830, also contains provisions enabling the Court to authorize guardians on behalf of minors to surrender and grant leases (*Re Griffiths* (1885) 29 Ch. D. 248). Guardians are authorized to represent their wards in certain cases where it is necessary or desirable to dispose of the ward's land for public purposes, e. g. under the Lands Clauses Consolidation Act, 1845, ss. 7, 8, 18, 71, 72; Schools Sites Act, 1841, s. 5; Literary and Scientific Institutions Act, 1854, s. 5. A guardian has also power to do certain formal acts on behalf of a ward who is owner of a British ship (Merchant Shipping Act, 1894, s. 55; *Michael* v. *Fripp* (1868) L. R. 7 Eq. 95).]

Rights of patronage

1948. A guardian in socage (? any other guardian) cannot present to a benefice belonging to the ward.

Co. Litt. 17 b, 89 a.
3 Inst. 156.

[The minor may himself present, whatever be his age (*Hearle* v. *Greenbank* (1749) 3 Atk., at p. 710).]

Legacies to minors

1949. A father, or (subject to § 1950) a guardian, is not entitled to receive, and cannot give a valid receipt for, a legacy bequeathed to a minor;[(a)] unless the Court authorizes,[(b)] or the testator has authorized,[(c)] such father or guardian to receive it.

(a) *Dugley* v. *Tolferry* (1715) 1 P. Wms. 285.
Rotherham v. *Fanshaw* (1748) 3 Atk., at p. 629, *per* Lord Hardwicke, C.
(b) *Hill* v. *Chapman* (1789) 2 Bro. C. C. 612.
Welsh v. *Welsh* (1852) 1 Drew. 64.
(c) *Cooper* v. *Thornton* (1790) 3 Bro. C. C. 96, 186.

Testamentary guardians

1950. A testamentary guardian of a minor is entitled to the custody, tuition, and management of the goods, chattels, and personal estate of the minor,[a] and can (*semble*) give a valid receipt for a legacy bequeathed to the minor.[b]

(a) 12 Car. II (1660) c. 24, s. 9.
Guardianship of Infants Act, 1886, s. 4.

(b) *McCreight* v. *McCreight* (1849) 13 Ir. Eq. 314.
Re Long [1901] W. N. 166.
(*Quære*, whether such a guardian could require payment.)

[It was held in *Re Cresswell* (1881) 45 L. T. 468, that a testamentary guardian is not entitled to payment of a minor's legacy which has been paid into Court; and, *semble*, a guardian, not being a testamentary guardian, has no right to receive or deal with the personal property of a minor (*Re Hellmann's Will* (1866) L. R. 2 Eq. 362; *Re Chatard* [1899] 1 Ch. 712 (foreign guardian)). In practice, trustees and executors, having money in their hands to which a minor is entitled, rarely pay such money to the testamentary guardian (if any), but pay it into Court under the Trustee Act, 1893, s. 42 (R. S. C., O. LIV b, r. 4).]

Guardian appointed by deed

1951. A guardian appointed by the deed of the father or mother of a minor has the same powers with regard to the minor's property as a testamentary guardian.

12 Car. II (1660) c. 24, ss. 8, 9.
Guardianship of Infants Act, 1886, ss. 3, 4.

Services of child

1952. A father is entitled to the services of his child being a minor, so long as the child is living with him, or, not being in the service of some other person, is only temporarily absent from his house.

[According to Blackstone, *Comm.* I, 453, a father 'may have the benefit of his children's labours while they live with him, and are maintained by him.' But there appears to be no judicial authority for this proposition, except the cases which refer to the parent's right to services as founding an action for seduction (e. g. *Terry* v. *Hutchinson* (1868) L. R. 3 Q. B. 599). The American Courts have held that a father is entitled to the earnings of a child; but such English authority as there is appears to be the other way (*Ex parte Macklin* (1755) 2 Ves. Sen. 675; *R.* v. *Chillesford* (1825) 4 B. & C. 94, 101).]

Fiduciary position of guardian

1953. A guardian is, in relation to any property of his ward which comes to his hands, in the position of a trustee for the ward.

Beaufort v. *Benty* (1721) 1 P. Wms. 703.
Mathew v. *Brise* (1851) 14 Beav. 341.

[For the discretionary powers of trustees of the property of minors to pay income to the minor's parent or guardian for his maintenance, education, or benefit, see *ante*, Bk. III, Sect. XVII, Tit. IV, §§ 1808, 1809.]

BOOK V

SUCCESSION

SECTION I

TESTAMENTARY SUCCESSION

TITLE I—THE MAKING OF TESTAMENTS AND CODICILS

Form of will

1954. Subject to §§ 1961–1965, *post*, no testament or codicil is valid unless:—

(i) it is in writing; *and*

(ii) it is signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; *and*

(iii) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time, who afterwards attest and subscribe the testament or codicil, in the presence of the testator.[a]

If these provisions are complied with, a document, intended to operate as a testament, may be valid as such, notwithstanding that it does not in terms purport to be a testament.[b]

(a) Wills Act, 1837, s. 9.
Cooper v. *Bocket* (1843) 3 Curt., at pp. 659–660; 4 Moo. P. C. 419.
Goods of Wilson (1866) L. R. 1 P. & M. 269.
Griffiths v. *Griffiths* (1871) L. R. 2 P. & M. 300.
(b) *Goods of Morgan* (1866) L. R. 1 P. & M. 214.
Ferguson-Davie v. *Ferguson-Davie* (1890) 15 P. D. 109.
Goods of Slinn (1890) *ibid.*, 156.

[As to what is the 'foot or end' of a testament, see Wills Act Amendment Act, 1852. The witnesses need not subscribe their names at the same time (*Brown* v. *Skirrow* [1902] P., at p. 5); and no special form of attestation is necessary, though a form stating that the formalities prescribed by the Wills Act, 1837, s. 9, have been complied with, has advantages in practice. A mark is (*Goods of Blewitt* (1880) 5 P. D., at p. 117), but (*semble*) a seal is not (*Smith* v. *Evans* (1751) 1 Wils. 313), a sufficient signature, either for the testator or the witnesses.]

'Presence' of witnesses

1955. The witnesses must have seen, or have been in such a position that they were able to see, the testator sign; or, if the testator has acknowledged his signature to them, they must have seen, or have been in such a position that they were able to see, the acknowledged signature.

Daintree v. *Butcher* (1888) 13 P. D. 102.
Brown v. *Skirrow* [1902] P. 3.

Witnesses need not know nature of document

1956. It is immaterial that the witnesses did not know that the document, of which they were attesting the signature, was a testament.

Keigwin v. *Keigwin* (1843) 3 Curt. 107.
Wright v. *Sanderson* (1884) 9 P. D. 149.

[It is sometimes said that s. 13 of the Wills Act, 1837, which provides that a testament or codicil executed in manner described in § 1954 does not require any further publication, is an authority for the rule in the text.]

Incorporated documents

1957. When a testament or codicil treats documents already in existence, but not executed as required by § 1954, as part of the testament or codicil, these documents will by such reference be incorporated into the testament or codicil; if it is proved that they are the documents referred to.[a] When a testament is republished by a codicil, this rule is applied to documents coming into existence between the date of the execution of the testament and the date of the execution of the codicil; if they are treated by the codicil as existing documents, or if the testament, construed as being executed at the date of the execution of the codicil, treats them as existing documents.[b]

(a) *Allen* v. *Maddock* (1858) 11 Moo. P. C. 427.
Goods of Smart [1902] P., at pp. 240, 241.
University College v. *Taylor* [1908] P. 140.
(b) *Goods of Lady Truro* (1866) L. R. 1 P. & M. 201.
Durham v. *Northen* [1895] P. 66.
Goods of Smart [1902] P. 238.

No one can make another's will

1958. A person cannot give to another the power to make a testament for him; but he can make the validity of his testament dependent upon a contingency, and such contingency may be the approval of another person.

Parsons v. *Lanoe* (1748) 1 Ves. Sen. 189.
Goods of Smith (1869) L. R. 1 P. & M. 717.

[Whether words importing a contingency are to be construed merely as a reason for making the disposition (in which case they will not affect its operation), or as a true condition affecting its operation, is a question of construction for the Court, which looks at the language employed, and, if that is ambiguous, the circumstances, and even the oral declarations of the testator (*Goods of Spratt* [1897] P. 28; *Estate of Vines* [1910] P. 147).]

Codicils

1959. When a codicil exists with a testament, it is read as part of the testament;[(a)] but if the testament is not forthcoming, and its provisions cannot be proved at the testator's death, and the codicil is forthcoming, the codicil operates alone.[(b)]

(a) *Fuller* v. *Hooper* (1750) 2 Ves. Sen., at p. 242, *per* Lord Hardwicke.
(b) *Goods of Clements* [1892] P. 254.

[It is the custom to describe a supplementary testament, which assumes the existence of a prior principal testament, as a 'codicil.' But there is, for legal purposes, no difference between a testament and a codicil.]

Confirmation of wills and codicils

1960. If a testator confirms his testament, any codicils thereto not previously revoked are (subject to the terms of the confirmation) likewise confirmed.

Goods of De La Saussaye (1873) L. R. 3 P. & M. 42.
Green v. *Tribe* (1878) 9 Ch. D., at p. 234, *per* Fry, J.

[A testament or codicil can only be confirmed by a document executed in compliance with the provisions of § 1954, *ante*.]

Law governing form of wills

1961. The formal validity of a testament of immovables situated in England is, subject to §§ 1963 and 1964, governed by the provisions set out in § 1954.[a] The formal validity of a testament of movables is, subject as aforesaid, governed by the law of the testator's domicile at the time of his death.[b] But no testament or codicil is invalidated, nor is its construction altered, by the testator's subsequent change of domicile.[c]

(a) *Pepin* v. *Bruyère* [1902] 1 Ch. 24.
(b) *In re Price* [1900] 1 Ch., at p. 451, *per* Stirling, J.
(c) Wills Act, 1861, s. 3 (which applies to aliens as well as British subjects (*Re Groos* [1904] P. 269)).

Form of testamentary appointment

1962. A power to appoint movables by testament, conferred by an English settlement, must be exercised by a testament executed either according to the forms required by the law of the testator's domicile at the time of his death (in addition to the forms, if any, prescribed by the settlement[a]) or according to the requirements of § 1954, *ante*.[b] And if the power is exercised by an instrument executed according to the requirements of § 1954, there may be a valid exercise of the power, though the instrument is invalid as a testament because it does not satisfy the forms required by the law of the testator's domicile.[c]

(a) *Barretto* v. *Young* [1900] 2 Ch. 339.
Re Walker [1908] 1 Ch. 560.
(b) *D'Huart* v. *Harkness* (1865) 34 Beav. 324.
In re Price [1900] 1 Ch. 442.

(c) *Goods of Hallyburton* (1866) L. R. 1 P. & M. 90.
Goods of Huber [1896] P. 209.
Re Walker, ubi sup.

[Bk. III, Sect. VI, Tit. I, § 1465 (i), which also deals with powers of appointment affecting land, must be read subject to this §.]

Wills of British subjects made abroad

1963. A testament or codicil of personal estate (including leaseholds[a]) made out of the United Kingdom by a British subject (whatever be that subject's domicile at the time of making the testament or at his death) is well executed for the purpose of admission to probate if executed in any one of the following forms: —

(i) the form required by the law of the place where it was made; *or*

(ii) the form required by the law of the place where the testator was domiciled when it was made; *or*

(iii) the form required by the law of that part of His Majesty's Dominions where the testator had his domicile of origin.[b]

(a) *Re Grassi* [1905] 1 Ch. 584.
(b) Wills Act, 1861, s. 1.

[It has been held that a testament made abroad, though admissible to probate under the provisions of the above §, is not a good exercise of a testamentary power of appointment under an English settlement, unless it complies with the requirements of § 1954 (*Re Kirwan's Trusts* (1883) 25 Ch. D. 373; *Hummel* v. *Hummel* [1898] 1 Ch. 642). But the correctness of these decisions is open to doubt (Dicey, *Conflict of Laws* (2nd ed.) App. Note 20).]

Wills of British subjects made in the United Kingdom

1964. A testament or codicil of personal estate made within the United Kingdom by a British subject (whatever be that subject's domicile at the time of making the testament or at his death) is well executed, and will be admitted to probate, if executed according to the forms required by the law for the time being in force in that part of the United Kingdom where it was made.

Wills Act, 1861, s. 2.

[These sections of the statute apply only to the testaments of British subjects; and therefore the testament of an alien, domiciled in the foreign State of which he is a subject, which is executed in that State in such a manner as to satisfy the requirements of English law, but not in such a manner as to satisfy the requirements of the foreign State, is invalid (*Goods of Von Buseck* (1881) 6 P. D. 211); even though the alien's domicile of origin was British (*Bloxam* v. *Favre* (1883) 8 P. D. 101; affd. on appeal (1884) 9 P. D. 130).]

Military and marine wills

1965. A soldier being on active military service, or a mariner or seaman being at sea, may dispose of his personal estate, either orally or by a writing which does not comply with the requirements of § 1954.

Wills Act, 1837, s. 11.
Drummond v. *Parish* (1843) 3 Curt. 522.

[A soldier is on active military service not only when he is serving on a campaign, but also when, in obedience to orders, the steps preliminary to starting on a campaign, such as going into barracks with a view to being sent on active service, have been taken (*Goods of Hiscock* [1901] P. 78), or when an order to mobilize has been issued (*Gattward* v. *Knee* [1902] P. 99). A mariner or seaman is 'at sea' if, having joined his ship, he is residing on her, even if he is on shore by virtue of temporary leave (*Earl of Euston* v. *Seymour*

(1802), cited 2 Curt. at p. 339; *Goods of Ley* (1840) 2 Curt. 375; *Goods of M'Murdo* (1867) L. R. 1 P. & M. 540); or if he is returning by sea from, or (*semble*) proceeding by sea to, his duty on his ship (*Goods of Daniel Saunders* (1865) L. R. 1 P. & M. 16). Substantial restrictions on the form and effect of the testaments, both of seamen and marines in the Royal Navy and of seamen in the mercantile marine, have, however, been imposed by statute (Navy and Marines (Wills) Acts, 1865, 1897; Merchant Shipping Act, 1894, s. 177). But, as regards the requirements of the Navy and Marines (Wills) Acts, these may, as respects persons dying during or in consequence of the present war, be disregarded by the Admiralty (Navy and Marines (Wills) Act, 1914).]

TITLE II — THE REVOCATION, ALTERATION, AND REPUBLICATION OF TESTAMENTS AND CODICILS

Law governing revocation

1966. Subject to Tit. I, §§ 1963 and 1964, *ante*, the validity of a revocation of a testament or codicil of immovables situated in England is governed by the provisions of this Title.[a] The validity of the revocation of a testament or codicil of movables is governed by the law of the testator's domicile at the time of his death.[b] But no testament or codicil is revoked or invalidated, nor is its construction altered, by the testator's subsequent change of domicile.[c]

(a) There seems to be no direct authority for this proposition, but its truth can hardly be questioned. (See Dicey, *Conflict of Laws* (2nd ed.) p. 505.)

(b) *Bremer* v. *Freeman* (1857) 10 Moo. P. C., at p. 359.
Re Price [1900] 1 Ch., at p. 451.

(c) Wills Act, 1861, s. 3.
Goods of Reid (1866) L. R. 1 P. & M. 74.

[This section of the Wills Act, 1861, applies both to aliens and to British subjects (*Re Groos* [1904] P. 269). Whether it applies to remedy a material invalidity caused by a change of domicile, as well as a formal invalidity, *quære*. (See Dicey, *Conflict of Laws* (2nd ed.) p. 637.)]

Every will revocable

1967. A testament or a codicil may be revoked or altered at the pleasure of the testator. A testator

cannot, by contract or otherwise, deprive himself of this power.

Vynior's Case (1610) 8 Rep., at fo. 82 a.

[Even if a person has contracted to make a testament containing special provisions, he may, nevertheless, revoke such testament; leaving the persons injured by such revocation to their remedy (if any) for the breach of contract (*Robinson* v. *Ommanney* (1883) 23 Ch. D. 285; *Re Parkin* [1892] 3 Ch. 510).]

Joint wills

1968. If two or more persons make a joint testament or codicil, or separate testaments or codicils in identical terms, any of such persons may at any time revoke or alter his part of the joint testament or codicil, or his separate testament or codicil.[a] But if one of the parties dies, and the other or others take a benefit under his testament, the estates of such other or others will be liable, if he or they should alter their testaments, to carry out the original arrangement.[b] If one of the parties to a joint testament or codicil dies, probate will be granted of so much of the instrument as becomes operative at his death.[c]

(a) *Hobson* v. *Blackburn* (1822) 1 Add. 274.
Estate of Heys [1914] P. 192.
(b) *Dufour* v. *Pereira* (1769) Dick. 419.
Walpole v. *Orford* (1797) 3 Ves. 402.
Stone v. *Hoskins* [1905] P. 194.
(c) *Goods of Piazzi-Smith* [1898] P. 7.

Revocation by marriage

1969. No testament or codicil is revoked by any presumption of an intention on the ground of an

alteration in circumstances;[a] but every testament or codicil is revoked by the testator's marriage, except in so far as it is made in exercise of a power of appointment when the property thereby appointed would not, in default of such appointment, pass to the persons entitled to the testator's property in the event of his intestacy.[b]

(a) Wills Act, 1837, s. 19.
(b) *Ibid.*, s. 18.
Goods of Russell (1890) 15 P. D. 111.

Formal revocation

1970. A testament or codicil may be revoked by writing duly executed as a testament and declaring an intention to revoke it,[a] or revoked or altered by a later testament or codicil,[b] in so far as an intention to revoke or alter it appears, either expressly or by implication, in such later testament or codicil.[c] If the intention of the testator is to alter but not to revoke his earlier testaments or codicils by later instruments, both the earlier and the later instruments will be admitted to probate, as together containing the testament of the deceased.[d]

(a) Wills Act, 1837, s. 20.
Goods of Gosling (1886) 11 P. D. 79.
(b) Wills Act, 1837, s. 20.
(c) *Lemage* v. *Goodban* (1865) L. R. 1 P. & M. 57.
Cadell v. *Wilcocks* [1898] P. 21.
Kent v. *Kent* [1902] P. 108.
Estate of Bryan [1907] P. 125.
(d) *Lemage* v. *Goodban, ubi sup.*
Goods of De La Saussaye (1873) L. R. 3 P. & M. 42.

[A duly executed testament, which is inoperative owing to the fact that it depends upon a contingency which has not happened, is inoperative to revoke an earlier testament (*Goods of Hugo* (1877) 2 P. D. 73). Two inconsistent testaments, each bearing the same date, are, in the absence of proof as to the order of execution, both void for uncertainty so far as they are inconsistent (*Phipps* v. *Anglesey* (1751) 7 Bro. P. C., at p. 452).]

Revocation by destruction

1971. A testament or codicil will be revoked if the testator, or some other person in his presence and by his direction, burns, tears, or otherwise destroys the testamentary document, with the intention of revoking it.[a] An act of destruction done by another person without the authority of the testator cannot be subsequently ratified by him.[b]

(a) Wills Act, 1837, s. 20.
(b) *Mills* v. *Milward* (1890) 15 P. D. 20.
Gill v. *Gill* [1909] P., at p. 161.

[Neither the destruction without the intention (*Gill* v. *Gill*, *ubi sup.*) nor the intention without the destruction (*Cheese* v. *Lovejoy* (1877) 2 P. D. 251) will be sufficient; and the extent of the destruction must be such as to render the document either incomplete in form (*Goods of Morton* (1887) 12 P. D. 141) or unintelligible in substance (*Leonard* v. *Leonard* [1902] P. 243) as a testament. A testament may be partially revoked by the destruction of a part of the testamentary document, if such appears to have been the intention of the testator (*Goods of Woodward* (1871) L. R. 2 P. & M. 206).]

Mechanical alterations

1972. A testament or codicil may be revoked or altered by obliterations, interlineations, or other changes in the testamentary document made after execution, with intent to revoke or alter; but only

in so far as the words of the document before such change are so effaced that they are not apparent without physical interference with the document.[a] But such interlineations and changes cannot themselves be admitted to probate, as forming part of the testament; unless they are executed in compliance with the requirements of Tit. I, § 1954, *ante*.[b]

(a) Wills Act, 1837, s. 21.
Brooke v. *Kent* (1840) 3 Moo. P. C. 334.
Townley v. *Watson* (1844) 3 Curt. 761.
Goods of Horsford (1874) R. L. 3 P. & M. 211.
Ffinch v. *Combe* [1894] P. 191.
(b) Wills Act, 1837, s. 21.

[Expert assistance (short of physical interference) may be employed to decipher the original words (*Ffinch* v. *Combe*, *ubi sup.*); and, if the effacement was intended only to operate contingently upon the validity of a substituted clause, even physical interference to decipher the original words is permitted (*Goods of Horsford*, *ubi sup.*; *Ffinch* v. *Combe*, *ubi sup.*, at p. 197).]

Revocation of appointments

1973. A testament which expressly revokes a former testament revokes appointments made by such testament.[a] Whether such appointments are revoked by a testament which does not expressly revoke former testaments, depends upon the words used by the testator in the later testament.[b] But general words of bequest in a later testament will not, without more, revoke an appointment made by an earlier testament in exercise of a special power of appointment.[c]

(a) *Sotheran* v. *Dening* (1881) 20 Ch. D. 99.
In re Kingdon (1886) 32 Ch. D. 604.

(b) *Kent* v. *Kent* [1902] P. 108.
(c) *Cadell* v. *Wilcocks* [1898] P. 21.

[Probably an appointment under a general power is revoked in such circumstances (*Sotheran* v. *Dening*, *ubi sup.*, at p. 106, *per* Jessel, M. R.).]

Animus revocandi

1974. An act or document, purporting to revoke or alter a testament or codicil, is not effectual, unless the intention to revoke or alter accompanies the execution of the act or document, and is unconditional.[a] If the intention to revoke or alter depends upon the existence or non-existence of facts which the testator erroneously supposes to exist or not to exist,[b] or upon a mistaken view of the validity of an intended substituted disposition,[c] the apparent revocation or alteration has no effect. ('Dependent Relative Revocation.')

(a) *Powell* v. *Powell* (1866) L. R. 1 P. & M., at p. 212, *per* Wilde, J.
Dancer v. *Crabb* (1873) L. R. 3 P. & M. 98.
(b) *Campbell* v. *French* (1797) 3 Ves. 321. (But see *Thomas* v. *Howell* (1874) L. R. 18 Eq. 198.)
(c) *Onions* v. *Tyrer* (1716) 1 P. Wms. 343.
Perrott v. *Perrott* (1811) 14 East, at pp. 439, 440.
Dancer v. *Crabb*, *ubi sup.*
Stanford v. *White* [1901] P. 46.

[The principle of dependent relative revocation is not applied when the testator, being under a mistake as to an imperative rule of law, e. g. against a devise of land to a charity, or against a particular exercise of a power of appointment, revokes a previous disposition to give effect to such an object (*Tupper* v. *Tupper* (1855) 1 K. & J. 665; *Quinn* v. *Butler* (1868) L. R. 6 Eq. 225). But the distinction is not very clear. Presumably, a conditional revocation operates as soon as the condition has been fulfilled.]

Dealings with property

1975. No conveyance made or other act done, subsequently to the execution of a testament or codicil, relating to any real or personal estate therein comprised, other than an act which has the effect of revoking, in manner described in §§ 1969–1972, *ante*, any disposition contained in such testament or codicil, will prevent the operation of the testament or codicil with respect to such interest in such real or personal estate as the testator could dispose of by testament or codicil at the time of his death.

Wills Act, 1837, s. 23.
Ford v. *De Pontes* (1861) 30 Beav., at pp. 593, 594.
Saxton v. *Saxton* (1879) 13 Ch. D. 359.

Codicils revoked with will

1976. A revocation of a testament is presumed to be a revocation of the testament with all the codicils thereto.[a] But if it appears from the circumstances of the case, that the testator did not intend to revoke all or any of the codicils, such codicil or codicils will be operative.[b]

(a) *Grimwood* v. *Cozens* (1860) 2 Sw. & Tr., at p. 368.
Goods of Greig (1866) L. R. 1 P. & M. 72.
Gardiner v. *Courthope* (1886) 12 P. D. 14.
(b) *Farrer* v. *St. Catherine's College* (1873) L. R. 19 Eq., at p. 23, *per* Lord Selborne, C.
Sugden v. *Lord St. Leonards* (1876) 1 P. D., at p. 206.
Goods of Bleckley (1883) 8 P. D. 169.

Lost wills

1977. If there is evidence that a person made a testament or codicil, and the testament or codicil is

not forthcoming at his death, there is a presumption of law that the testator destroyed it with the intention of revoking it.[a] Evidence may be given to rebut this presumption, and to prove the contents of the lost instrument;[b] but if the evidence offered to prove its contents is parol evidence only, it must be of extreme cogency.[c]

(a) *Eckersley* v. *Platt* (1866) L. R. 1 P. & M. 281.

[This presumption does not apply if the testator becomes insane after the execution of the testament (*Sprigge* v. *Sprigge* (1868) L. R. 1 P. & M. 608).]

(b) *Sugden* v. *Lord St. Leonards* (1875) 1 P. & D. 154.
Re Spain (1915) XXXI T. L. R. 435.

(c) *Woodward* v. *Goulstone* (1886) L. R. 11 App. Ca., at p. 475, *per* Lord Herschell, C.

[Post-testamentary declarations of the testator are not admissible to prove that a lost testament was duly executed (*Atkinson* v. *Morris* [1897] P. 40). It is not quite settled whether such declarations are admissible to prove the contents of the testament (*Sugden* v. *Lord St. Leonards* (1875) 1 P. D., at p. 241; *Woodward* v. *Goulstone*, *ubi sup.*, at pp. 478–481).]

Lost revocation

1978. In order to establish the revocation of a testament or codicil by a missing testament or codicil subsequently executed, either documentary or conclusive evidence of the contents of such subsequent testament or codicil must be given.

Cutto v. *Gilbert* (1854) 9 Moo. P. C. 131 (see esp. pp. 140–141).

Alterations in will

1979. If a testament or codicil is produced, with alterations on the face of it, the person seeking to

take advantage of the alterations must prove that such alterations were made before the testament was executed.[a] In the absence of evidence, it will be presumed that the alterations were made after execution.[b]

(a) *Williams* v. *Ashton* (1860) 1 J. & H. 115.
(b) *Cooper* v. *Bockett* (1846) 4 Moo. P. C. 419.

[If, however, the alterations take the form of interlineations, the Court may presume, from the nature of the interlineations and the internal evidence of the document, that the interlineations were made before execution (*Goods of Cadge* (1868) L. R. 1 P. & M. 543).]

Revival of will

1980. A testament or codicil which has been revoked may, unless the document containing it has been wholly destroyed with intent to revoke,[a] be revived by re-execution with the formalities required by Tit. I, § 1954, *ante*, or by a duly executed codicil which shows an intention to revive the revoked testament or codicil.[b] Such intention may be shown either by express words, or by dispositions or language inconsistent with any other intention.[c]

(a) *Rogers* v. *Goodenough* (1862) 2 S. W. & Tr. 342.
Goods of Steele (1868) L. R. 1 P. & M. 575.
Goods of Alfred Reade [1902] P. 75.
(b) Wills Act, 1837, s. 22.
Re Smith (1890) 45 Ch. D. 632.
(c) *Goods of Steele, ubi sup.*, at p. 578.
Goods of Reynolds (1873) L. R. 3 P. & M. 35.
Goods of Dennis [1891] P. 326.

[A reference by a testator in a later testament or codicil to a revoked testament by its date will, *primâ facie*, revive that testament, if it assumes that such testament is still operative. But this

inference may be rebutted, if it can be proved from the circumstances that the testator has made a mistake in the date, and did not intend to refer to that testament (*Goods of Ince* (1877) 2 P. D. 111). But if a codicil is made to a revoked testament, and the codicil is drawn with reference to the provisions of such testament, the revoked testament will be revived; even though the testator did not in fact intend to revive it (*Goods of Stedham; Goods of Dyke* (1881) 6 P. D. 205).]

Codicils revived with will

1981. A codicil which revives a revoked testament is presumed to revive all the codicils thereto.[a] But this presumption may be rebutted by the express words,[b] or by the nature of the contents, of the reviving codicil.[c]

(a) *Green* v. *Tribe* (1878) 9 Ch. D., at p. 234.
(b) *Ibid.*
(c) *Goods of Reynolds* (1873) L. R. 3 P. & M. 35.

Partial revocation

1982. When any testament or codicil which has been partly revoked, and afterwards wholly revoked, is revived, the revival does not extend to the part originally revoked; unless an intention of the testator to the contrary can be shown.

Wills Act, 1837, s. 22.
Neate v. *Pickard* (1843) 2 Notes of Cases, 406.

Effect of revival

1983. Subject to Tit. IV, § 1996, *post*, a testament revived by a later testament or codicil speaks as from the date of the later document.

Re Champion [1893] 1 Ch. 101.
Re Rayer [1903] 1 Ch. 685.

TITLE III — CAPACITY TO MAKE OR ATTEST A TESTAMENT OR CODICIL

Law governing testamentary capacity

1984. Capacity to make or attest a testament of immovables situated in England is governed by the provisions of this Title.[a] Capacity to make or attest a testament of movables is governed by the law of the testator's domicile at the time of his death.[b]

(a) *In re Hernando* (1884) 27 C. D. 284.
(b) *Goods of Maraver* (1828) 1 Hagg. Eccl. 498.

General capacity

1985. Subject to the exceptions contained in this Title, every person has full capacity to make and attest a testament.

Wills Act, 1837, s. 3.

Wills of infants

1986. No person under the age of twenty-one years can make a valid testament;[a] except that a soldier being on active military service, or a mariner or seaman being at sea, may make a testamentary disposition of personal estate at the age of fourteen.[b]

(a) Wills Act, 1837, s. 7.
(b) *Ibid.*, s. 11. Doubtless 'personal estate' includes for this purpose leasehold interests in land (*Re Grassi* [1905] 1 Ch. 584, on the Wills Act, 1861).

Goods of Farquhar (1846) 4 Notes of Cases, 651.
Goods of M'Murdo (1867) L. R. 1 P. & M. 540.

[A married woman has full testamentary capacity over her separate property belonging to her at her death; whether or not she was entitled to any such property at the time when she made her testament. And a testament of separate property will pass property acquired after the death of her husband. (Married Women's Property Act, 1882, s. 1; Married Women's Property Act, 1893, s. 3; *In re Wylie* [1895] 2 Ch. 116.) Outlawry in consequence of criminal proceedings causes no testamentary incapacity; but the forfeiture of the outlaw's property thereby incurred restricts the operation of the testament to directions not dealing with such property (Forfeiture Act, 1870, s. 1; *Goods of Bailey* (1861) 1 Sw. & Tr. 156). A convict can (probably) make a valid testament (*Ex parte Graves* (1881) 19 Ch. D. 1).]

Soundness of mind essential

1987. No person can make a testament unless he is of sound mind, memory, and understanding when he makes it.[a] Subject to § 1988, *post*, a testator will be presumed to have had these qualifications till the contrary is proved.[b]

(a) *Mountain* v. *Bennet* (1787) 1 Cox, at p. 356, *per* Eyre, C. B. *Boughton* v. *Knight* (1873) L. R. 3 P. & M. 64.

[If a testator was of sound mind when he gave the instructions for the preparation of his testament, and the testament was drawn in pursuance of those instructions, the fact that he did not understand its provisions when he executed it is immaterial; if he remembers that he gave the instructions, and accepts the document as carrying them out (*Parker* v. *Felgate* (1883) 8 P. D. 171; approved by the J. C. in *Perera* v. *Perera* [1901] A. C., at p. 361).]

(b) *Sutton* v. *Sadler* (1857) 3 C. B. N. S. 87.

Presumption of unsoundness

1988. If it be proved that a testator was not of sound mind, memory, and understanding at any time

prior to the making of the testament, his testament will be presumed to be invalid, until it is proved that he was of sound mind when he made it. The appearance and contents of the testament, and the circumstances attendant upon its execution, will be considered in coming to a conclusion on this point.

A. G. v. *Parnther* (1792) 3 Bro. C. C. 441.
Cartwright v. *Cartwright* (1793) 1 Phillim. 90.
Symes v. *Green* (1859) 1 Sw. & Tr. 401.

Particular delusions

1989. If a testator suffers from a particular delusion, but is otherwise sane, his testament is valid if its contents have not been influenced by the particular delusion.

Dew v. *Clark* (1826) 3 Add. 79.
Banks v. *Goodfellow* (1870) L. R. 5 Q. B. 549.
Smee v. *Smee* (1879) 5 P. D. 84.

Will of intoxicated person

1990. A testament made while the testator was in a state of intoxication is invalid.

Ayrey v. *Hill* (1824) 2 Add. 206.

Physical defects and illiteracy

1991. Deafness and dumbness,[a] blindness,[b] and inability to read,[c] cause no testamentary incapacity. But the Court will require proof that a person thus afflicted knew and approved of the contents of his alleged testament.[d]

(a) *Goods of Francis Owston* (1862) 2 Sw. & Tr. 461.
Goods of Geale (1864) 3 Sw. & Tr. 431.
(b) *Re Charles Axford* (1860) 1 Sw. & Tr. 540.
(c) *Barton* v. *Robins* (1769) 1 Phill. 455 n. (*b*).
(d) *Longchamp* v. *Fish* (1807) 2 Bos. & P. N. R. 415.
Edwards v. *Fincham* (1842) 4 Moo. P. C. 198.

Force, fraud, and undue influence

1992. A testament or codicil made as the result of the exercise of force,[a] or fraud,[b] or undue influence,[c] is invalid, in so far as its dispositions have been caused by these means.[d]

(a) *Mountain* v. *Bennet* (1787) 1 Cox, at p. 355.
(b) *Lord Donegal's Case* (1751) 2 Ves. Sen., at p. 408, *per* Lord Hardwicke, C.
Allen v. *McPherson* (1847) 1 H. L. C., at p. 208.
(c) *Wingrove* v. *Wingrove* (1886) 11 P. D. 81.
Baudains v. *Richardson* [1906] A. C., at pp. 184, 185, *per* Lord Macnaghten.
(d) *Trimlestown* v. *D'Alton* (1827) 1 Dow. & Cl., at p. 95, *per* Lord Eldon, C.
Allen v. *McPherson, ubi sup.*, at p. 233, *per* Lord Campbell.

What is 'undue influence'

1993. Undue influence, for the purpose of § 1992, means influence of such a nature that the volition of the testator is subjected to the coercion or domination of another person.[a] There is no presumption of undue influence from the situation of the parties, or from the fact that the party alleged to have exercised undue influence benefited under the testament.[b]

(a) *Parfitt* v. *Lawless* (1876) L. R. 2 P. & M. 462.
Wingrove v. *Wingrove, ubi sup.*
Baudains v. *Richardson, ubi sup.*

[This requirement distinguishes 'undue influence' as it affects testaments, from a similar defect as it applies to transactions *inter vivos* (*ante*, Bk. I, Sect. III, Tit. II, §§ 81, 84, 85).]

(b) *Boyse* v. *Rossborough* (1857) 6 H. L. C., at p. 49, *per* Lord Cranworth.
Parfitt v. *Lawless*, *ubi sup.*
Spiers v. *English* [1907] P., at p. 24.

[In this respect also the rule is different from that applying to transactions *inter vivos*. But if circumstances arouse the suspicion of the Court, the persons setting up the instrument must prove affirmatively, that the testator knew and approved of its contents (*Barry* v. *Butlin* (1838) 2 Moo. P. C. 480; *Tyrrell* v. *Painton* [1894] P. 151).]

Competency of witness

1994. All persons, whether minors or not, are competent to attest the execution of a testament, if they understand the act which they are performing.[a] But if any witness attests the execution of a testament, to whom, or to whose wife or husband, any beneficial interest in property is given by the testament which such witness attests, the gift to him or her, or to his or her wife or husband, or to any persons claiming under them, is void.[b]

(a) *Hudson* v. *Parker* (1844) 1 Rob., at pp. 35, 36.
(b) Wills Act, 1837, s. 15.
Creswell v. *Creswell* (1868) L. R. 6 Eq. 69.
Re Fleetwood (1880) 15 Ch. D. 594.

[If there is a testament with codicils, and a witness has attested the execution of only one of those instruments, he or she, or his or her wife or husband, may take a gift under any of such instruments the execution of which he or she has not attested; although it confirms or republishes the instrument which he or she has attested (*Tempest* v. *Tempest* (1856) 2 K. & J. 642; *Anderson* v. *Anderson*

(1872) L. R. 13 Eq. 381; *Trotter* v. *Trotter* [1899] 1 Ch. 764). A charge or direction for the payment of debts is not a gift for the purposes of this § (Wills Act, 1837, s. 16). If a testament is apparently attested by more than two persons, and a legacy is bequeathed by it to one of them, the latter can take the legacy, if it can be proved that he did not sign as a witness (*Randfield* v. *Randfield* (1860) 30 L. J. Ch. 179 n.). If, after the execution of the testament, an attesting witness marries a legatee or devisee, the legacy or devise is not thereby invalidated (*Thorpe* v. *Bestwick* (1881) 6 Q. B. D. 311); and a supervening incompetency in a witness does not render a previous attestation invalid (Wills Act, 1837, s. 14). The fact that a person is appointed executor by a testament does not render him incompetent to be admitted a witness to prove its execution, or its validity or invalidity (Wills Act, 1837, s. 17).]

TITLE IV — DEVISES, LEGACIES, AND DONATIONES MORTIS CAUSA

Power of disposition

1995. A person may by his testament devise all the real and bequeath all the personal property to which he is entitled at the time of his death, and which, on his death, passes to his personal representative, as such, or which, if not so devised or bequeathed, would pass to his customary heir general.

Wills Act, 1837, s. 3.
Land Transfer Act, 1897, s. 1.

[Ss. 4 and 5 of the Wills Act, 1837, provide for the payment of the fees due by the custom of the manor in the case of the devise of copyhold or customary freehold, for the entry of such testaments on the court rolls, and, where such lands were not devisable before this Act, for the payment by the devisee of the same fees as the customary heir was liable to pay. Despite the general words of s. 1 of the Land Transfer Act, 1897, it is generally assumed that estates tail and quasi-tail do not pass to the personal representatives of a deceased tenant; and, in some cases, claims in Tort, not prosecuted to judgment, are destroyed by the death of the claimant (*ante*, Bk. II, Pt. III, Sect. I, Tit. VI, § 786). A joint interest passes to survivors, not to the representatives of a deceased owner. It cannot be affected by the testament of the latter (*ante*, Bk. III, Sect. XVI, §§ 1753–1756). A direct disposition of real estate by testament is known as a 'devise'; a similar disposition of personal estate as a 'legacy' or 'bequest.']

Will speaks from death

1996. Every testament is construed with reference to the dispositions of real and personal property contained in it, to speak and take effect as if it had been

executed immediately before the death of the testator; unless a contrary intention appears by the testament.[a] Such a contrary intention will appear if the date of the testament, as contrasted with the date of the testator's death, is clearly referred to as governing the extent of the disposition,[b] or if the subject-matter of the disposition is specifically described as belonging to the testator at the date of the testament.[c]

(a) Wills Act, 1837, s. 24.
Lady Langdale v. *Briggs* (1856) 2 Jur. N. S., at p. 996, *per* Turner, L. J.
(b) *Cole* v. *Scott* (1849) 1 Mac. & G. 518.
In re Ord (1879) 12 Ch. D., at p. 25, *per* Baggallay, L. J.
(c) *Emuss* v. *Smith* (1848) 2 De G. & Sm. 722.
Re Portal and Lamb (1885) 30 Ch. D. 50.

[Difficult questions sometimes arise in the case of a legacy of stocks and shares, where one company has amalgamated with another, or has reconstructed, or has subdivided its original shares, or converted them into stock. (See, e. g. *Re Clifford* [1912] 1 Ch. 29; *Re Leeming*, *ibid.*, 828.)]

Insufficient description of beneficiary

1997. If either the subject-matter of,[a] or (subject to Bk. III, Sect. XVII, Tit. I, § 1766, *ante*) the persons to be benefited[b] by, a devise or a legacy, is or are not sufficiently described, the devise or legacy is void for uncertainty. But if there is a devise or a legacy to such of a number or class of persons, or in such proportions, as a person named by the testator shall appoint, without a gift over in default of appointment, and the power is in the nature of a trust in favour of the objects of the power, the fact that no

appointment is made will not cause the gift to fail for uncertainty; but the property will be divided equally among the objects of the power.[c]

(a) *Jubber* v. *Jubber* (1839) 9 Sim. 503.
(b) *Lowndes* v. *Stone* (1797) 4 Ves. 649.
(c) *Brown* v. *Higgs* (1803) 8 Ves., at p. 574.
In re Weekes' Settlement [1897] 1 Ch. 289.

Specific and general legacies

1998. A specific legacy is a gift of some piece of personal estate which a testator, identifying it by a sufficient description, and manifesting an intention that it shall be enjoyed or taken in the state and condition indicated by that description, separates from the general mass of his personal estate. A general legacy is a gift of personal estate not particularly described and identified, and not specially separated from the body of the estate.

Bothamley v. *Sherson* (1875) L. R. 20 Eq., at pp. 308, 309, *per* Jessel, M. R.
Robertson v. *Broadbent* (1883) L. R. 8 App. Ca., at p. 815, *per* Lord Selborne, C.

Ademption of specific legacies

1999. A specific legacy is revoked by ademption if, at the testator's death, the property bequeathed has ceased to exist,[a] or is not the property of the testator,[b] or has changed its form so that it no longer answers to the description of it in the testament,[c] or has permanently changed its locality when the locality is an essential part of its description,[d] or has been other-

wise bequeathed by a later clause in the same testament or in a codicil thereto.[e] A partial destruction[f] or different disposition[g] revokes the legacy *pro tanto*.

(a) *Ashburner* v. *Macguire* (1786) 2 Bro. C. C. 336.
In re Bridle (1879) 4 C. P. D. 336.
(b) *Ashburner* v. *Macguire, ubi sup.*
(c) *In re Lane* (1880) 14 Ch. D. 856.
In re Gray (1887) 36 Ch. D. 205.
Re Slater [1907] 1 Ch. 665.
(d) *Chapman* v. *Hart* (1749) 1 Ves. Sen. 273.
Colleton v. *Garth* (1833) 6 Sim. 19.
Re Johnston (1884) 26 Ch. D., at p. 553.
(e) *Kermode* v. *McDonald* (1868) L. R. 3 Ch. App. 584.

[The fact that the substituted disposition fails to take effect, e. g. by reason of lapse, does not prevent it operating as an ademption of the original bequest (Wills Act, 1837, s. 22).]

(f) *Ashburner* v. *Macguire, ubi sup.*
(g) *Ibid.*

[The doctrine of ademption applies to gifts made under a testamentary power of appointment, whether the power be general or special (*In re Dowsett* [1901] 1 Ch. 398; *In re Moses* [1902] 1 Ch. 100).]

Acts of strangers

2000. A change in the character of the property bequeathed, made by a third person without the knowledge, and against the wishes, of the testator, will not cause the legacy to be adeemed.[a] But the fact that the change has been effected by a public authority will not prevent ademption taking place.[b]

(a) *Shaftesbury* v. *Shaftesbury* (1716) 2 Vern. 748.
Jenkins v. *Jones* (1866) L. R. 2 Eq. 323.
(b) *In re Slater* [1907] 1 Ch. 665.

All devises specific

2001. Devises, including residuary and other general devises,[a] are, for the purposes of §§ 1999 and

2000, *ante*, treated as specific legacies, and are subject to the same rules in the administration of the estate.[b]

(a) *Hensman* v. *Fryer* (1867) L. R. 3 Ch. App. 420.
Lancefield v. *Iggulden* (1874) L. R. 10 Ch. App. 136.

[The following instances of a general devise are given by the Wills Act, 1837, ss. 26 and 27: — 'a devise of the real estate of the testator, or of the real estate of testator in any place, or in the occupation of any person mentioned in the will, or otherwise described in a general manner.' A specific devise has been judicially described as a devise of property intended to be separated by the testator as between the objects of his bounty from the rest of his property (*Spong* v. *Spong* (1829) 3 Bligh, N. S., at p. 105, *per* Lord Manners). Any devise which is not specific is general; and a devise of 'land' includes leaseholds and copyholds, unless a contrary intention appears by the testament (Wills Act, 1837, s. 26). *Quære:* whether this s. applies to devises of 'real estate' (*Guyton & Rosenberg's C.* [1901] 2 Ch. 591).]

(b) *Bothamley* v. *Sherson* (1875) L. R. 20 Eq., at p. 312, *per* Jessel, M. R.

[The reason for the rule that a residuary devise is treated as specific is historical. Before the Wills Act, 1837, s. 24, a devise only passed the real estate which the testator had at the making of the testament. It followed, therefore, that every devise must be specific; because it operated only upon the specific real estate belonging to the testator when it was made. The cases cited decided, somewhat illogically, that, though by the Wills Act a testament now operates upon all the testator's real estate belonging to him at death, this consequence of the old state of the law still remained. It should be noted, however, that a charge of debts or legacies on real estate is satisfied (as between the persons entitled to such real estate) primarily out of the residuary devise (*Conron* v. *Conron* (1858) 7 H. L. C. 168).]

Abatement of legacies

2002. If a testator's assets are not sufficient for the payment of the general legacies bequeathed by

his testament, the general legacies will abate, and, in the absence of a contrary direction by the testator,[a] abate rateably.[b] But if a general legacy is given to a wife in exchange for the abandonment by her of an enforceable claim to dower,[c] or (possibly) to a creditor to whom a debt is owing exceeding the amount of the legacy and in consideration of the abandonment of the debt,[d] it has priority over other general legacies.

(a) *Lewin* v. *Lewin* (1752) 2 Ves. Sen. 415.
In re Hardy (1881) 17 Ch. D. 798.

[But a direction to pay a legacy to a testator's widow within three months of his death does not amount to a direction to the contrary; and such legacy will abate rateably with the other general legacies, if there is a deficiency of assets (*In re Schweder* [1891] 3 Ch. 44).]

(b) *Barton* v. *Cooke* (1800) 5 Ves., at p. 464.

[If a legacy is given free of legacy duty, the duty payable is treated as an additional legacy and added to the legacy for the purpose of reckoning the amount of the abatement (*In re Turnbull* [1905] 1 Ch. 726).]

(c) Dower Act, 1833, s. 12.
Re Greenwood [1892] 2 Ch. 295.
(d) *Re Whitehead* [1913] 2 Ch., at p. 59, *per* Farwell, L. J.

Demonstrative legacies

2003. A general legacy which the testator directs to be paid out of a particular fund indicated by him is called a 'demonstrative' legacy.[a] So long as such particular fund lasts, the legacy is treated as specific; but if the fund has been wholly or partially ex-

hausted during the testator's lifetime, the legacy ranks wholly or to that extent as a general legacy.[b]

(a) *Paget* v. *Huish* (1863) 1 H. & M., at p. 671.
(b) *Robinson* v. *Geldard* (1852) 3 M. & G., at p. 745.
Sellon v. *Watts* (1861) 9 W. R. 847.

Residuary devises and bequests

2004. A residuary devise or bequest includes all property comprised or intended to be comprised in any other devise or bequest contained in the testament, which has failed to take effect.[a] None of such property is excluded unless it is specifically excepted by the testament.[b]

(a) Wills Act, 1837, s. 25.
Cambridge v. *Rous* (1802) 8 Ves., at p. 25, *per* Grant, M. R.
Blight v. *Hartnoll* (1883) 23 Ch. D. 218.
Re Mason [1901] 1 Ch., at p. 632, *per* Vaughan Williams, L. J.
(b) *In Re Bagot* [1893] 3 Ch. 348.
In re Fraser [1904] 1 Ch. 726.

[It is possible in a testament to have two good residuary devises, one of freeholds and the other of copyholds; and s. 25 of the Wills Act, 1837, is applicable to both (*Re Mason*, *ubi sup.*). Lapsed shares of residue do not fall into residue (*Green* v. *Pertwee* (1846) 5 Hare, 249); unless the testator shows an intention to that effect (*Re Palmer* [1893] 3 Ch. 369; *Re Parker* [1901] 1 Ch. 408), or unless the residuary beneficiaries take as joint owners (*Webster* v. *Webster* (1726) 2 P. Wms. 347).]

Title of beneficiary

2005. Until the personal representative has assented to a devise or legacy, the devisee or legatee (even if the devise or legacy is vested) has only a right to administration of the estate and transfer or payment of the subject-matter of the devise or legacy

in due course.[a] When the personal representative has assented, a devisee or specific legatee has a legal or equitable right (vested or contingent as the case may be) to the subject-matter of the devise or legacy, as from the death of the testator, and can enforce such right against the personal representative and third parties.[b] But no direct action to recover a general legacy lies against the personal representative, even after assent.[c]

(a) Bl. *Comm.* II, 512.
(b) *Saunders' Case* (1599) 5 Rep., at fo. 12 b.
Re West [1909] 2 Ch., at p. 185, *per* Swinfen Eady, J.
(c) *Deeks* v. *Strutt* (1794) 5 T. R. 690.
Jones v. *Tanner* (1827) 7 B. & C. 542.
Re West, ubi sup., at p. 186.

[The assent of the personal representative, which (except in certain cases, e. g. of a devise of registered land (Land Transfer Act, 1897, s. 3 (4)), may be in any form, and express or implied (*Mason* v. *Farnell* (1844) 12 M. & W., at pp. 681–2), may be compelled after the expiry of a year from the testator's decease; unless the personal representative can show good cause for withholding it (Land Transfer Act, 1897, s. 3 (2); *Brooke* v. *Lewis* (1822) 6 Madd. 358). The assent of one of several representatives is sufficient in the case of a legacy (*Townson* v. *Tickell* (1819) 3 B. & Ald., at p. 40); but the assent of all the representatives who prove the testament, or an Order of the Court, is necessary to vest devised real estate in the devisee (Land Transfer Act, 1897, s. 3 (1); Conveyancing Act, 1911, s. 12). A representative who assents to a devise or a legacy (including a legacy of ascertained residue) made or given to himself upon trust, becomes a trustee of the property comprised in it (*Dix* v. *Burford* (1854) 19 Beav. 409; *Re Smith* (1889) 42 Ch. D. 302).]

Conditional assent of representative

2006. The assent of the representative may be made subject to a condition subsequent, if the con-

dition is within the powers of the representative to impose as the administrator of the assets.[a] When once an unconditional assent has been voluntarily given, it cannot be retracted;[b] but a payment made by a personal representative to a legatee without notice of an existing debt due from the estate, may be recovered by the representative, to the extent of the debt.[c]

(a) *Elliott* v. *Elliott* (1841) 9 M. & W., at p. 28, *per* Parke, B.

[An assent to a devise of real estate may be made subject to a charge for the payment of any money which the representative is liable to pay (Land Transfer Act, 1897, s. 3 (ii)); but the property itself cannot be made subject to a charge for debts for which, before the Act, the personal representatives would not have been liable (*Re Cary's and Lott's Contract* [1901] 2 Ch. 463).]

(b) *Noell* v. *Robinson* (1682) 1 Vern. 90.
Newman v. *Barton* (1690) 2 Vern. 205.
(c) *Jervis* v. *Wolferstan* (1874) L. R. 18 Eq. 18.

[This case and *Whittaker* v. *Kershaw* (1890) 45 Ch. D. 320, show that the executor can also recover if he pays with notice of a liability which has not yet become a debt.]

Assent cannot be compelled for a year

2007. The devisee or legatee, even of a vested devise or legacy, cannot compel the representative to assent or to make a conveyance or payment until a year after the testator's death;[a] even though a provision to the contrary is contained in the testament.[b] But the representative may, if he thinks fit, assent, convey, or pay, before that time.[c]

(a) Land Transfer Act, 1897, s. 3 (2).
Wood v. *Penoyre* (1807) 13 Ves., at pp. 333, 334.
Benson v. *Maude* (1821) 6 Madd. 15.

[Presumably, as a contingent devisee or legatee has no right to his devise or legacy till the contingency is fulfilled, he cannot, before that event, compel the executor to assent.]

(b) *Brooke* v. *Lewis* (1822) *ibid.*, 358.
(c) *Angerstein* v. *Martin* (1823) Turn. & Russ., at p. 241.

Interest on legacy for life

2008. If a general legacy is bequeathed for life, with remainder over, interest does not begin to accrue in favour of the life tenant, till the end of a year from the testator's death.

Gibson v. *Bott* (1802) 7 Ves., at p. 96.

[The reason assigned by Lord Eldon is, that it is only the interest of the legacy which is given to the tenant for life; and, as the legacy is not payable till a year from the death, no interest can accrue until that date. In the case of a general legacy bequeathed to legatees in succession, the capital is usually vested in trustees (*ante*, Bk. III, Sect. IX, Tit. I, § 1540 (1)); but a specific legacy may be vested legally in the life owner, with an executory limitation over on his death (*ibid.*, § 1540 (2)). In such a case, the life-owner is a quasi-trustee of the interest of the remainderman, and will be responsible for unexplained loss or damage (*Re Swan* [1915] 1 Ch. 829).]

Income of devise or specific legacy

2009. A vested devisee or specific legatee is entitled to all the profits accruing from the property devised or bequeathed, as from the testator's death,[a] and is (*semble*) chargeable with the cost of its upkeep, care, and preservation, as from that date.[b] But if the devise or legacy is contingent, the accretions, pending the contingency, fall into residue;[c] unless,

in the case of personalty, the testator directs the specific fund to be set apart and invested for the benefit of the legatee.(d)

(a) *Re Pearce* [1909] 1 Ch. 819.
(b) Contrary rules as to this are laid down by *Re Pearce, ubi sup.*, and *Sharp* v. *Lush* (1879) 10 Ch. D., at p. 472.
(c) *Hodgson* v. *E. of Bective* (1863) 1 H. & M. 376.
Guthrie v. *Walrond* (1883) 22 Ch. D., at p. 578.
(d) *Re Woodin* [1895] 2 Ch., at pp. 314, 315.

[Of course the rule stated in the latter part of this § applies only to devises and legacies which are contingent on the happening of conditions precedent (*ante*, Bk. I, Sect. III, Tit. III, § 110). A devise or legacy which is actually vested is, though liable to be devested by the happening of a subsequent contingency, not a contingent devise or legacy for the purposes of this § (*Re Buckley* (1883) 22 Ch. D. 583). The income of real estate cannot be suspended during a contingency, for that would virtually involve an abeyance of the freehold; and, even in the case of personalty, suspension cannot be beyond the period allowed for accumulation (Bk. III, Sect. XV, Tit. IV, § 1739; *C. of Bective* v. *Hodgson* (1864) 10 H. L. C., at pp. 664, 665, *per* Lord Westbury, C.).]

Income of general legacy

2010. Subject to the provisions of § 2011, *post*, a general legatee is not entitled to interest on his legacy as from the testator's death.(a) But if no time is fixed for the payment of the legacy, interest at four *per cent.*(b) is payable on a vested general legacy as from a year from the testator's death (c) until payment of the legacy; (d) even though the legacy is payable out of a reversionary interest.(e) If a time has been fixed by the testator for payment of the legacy, interest is payable from that date.(f)

(a) *Benson* v. *Maude* (1821) 6 Madd. 15
(b) R. S. C. Order LV, R. 64.
Re Davey [1908] 1 Ch. 61.
(c) *Hearle* v. *Greenbank* (1749) 3 Atk., at p. 716.
(d) *Lord* v. *Lord* (1867) L. R. 2 Ch. App., at p. 789, *per* Lord Cairns.
(e) *Walford* v. *Walford* [1912] A. C. 658.
(f) *Heath* v. *Perry* (1744) 3 Atk., at p. 102, *per* Lord Hardwicke, C.
Crickett v. *Dolby* (1795) 3 Ves. 10.
Festing v. *Allen* (1842) 5 Ha. 573.

Exceptional cases

2011. Interest is payable to the legatee on a vested general legacy from the death of the testator: —

(i) if the legacy is given in satisfaction of a debt; *or*,

Clark v. *Sewell* (1744) 3 Atk., at p. 99.

(ii) if the legacy is given to a minor to whom the testator stood *in loco parentis*; *or*,

Beckford v. *Tobin* (1749) 1 Ves. Sen., at p. 310, *per* Lord Hardwicke, C.
Wilson v. *Maddison* (1843) 2 Y. & Coll. C. C. 372.

(iii) if the legacy is charged upon land.

Pearson v. *Pearson* (1802) 1 Sch. & Lef., at p. 11, *per* Lord Redesdale, C.

[This last rule does not apply when there is a direction to convert the realty at the testator's death and pay the legacies from the proceeds (*Turner* v. *Buck* (1874) L. R. 18 Eq. 301); it does apply when the direction is to convert and pay the legacies from the proceeds after the death of a tenant for life (*In re Waters* (1889) 42 Ch. D. 517). As to interest on contingent legacies, see *ante*, Bk. III, Sect. XVII, Tit. IV, § 1809, n.]

Arrears of interest

2012. A legatee cannot recover more than six years' arrears of interest; whether or not his legacy

is charged upon land or rent, or secured by an express trust.[a] But, if the legacy is payable out of a reversionary interest which cannot be realized, the legatee is entitled, when the reversion falls in, to interest as from the date at which the legacy was *primâ facie* payable.[b]

(a) Real Property Limitation Act, 1833, s. 42.
Real Property Limitation Act, 1874, s. 10.
(b) *Re Blachford* (1884) 27 Ch. D. 676.

[As to the period after which an action to recover a devise or a legacy is barred, see *ante*, Bk. I, Sect. V, § 159; and as to the period of limitation for an annuity, see *ante*, Bk. III, Sect. XIII, Tit. III, § 1633.]

'Die without issue'

2013. In a devise or bequest, the words 'die without issue' or 'die without leaving issue,' or 'have no issue,' or other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, are construed to mean a want or failure of issue in the lifetime, or at the time of the death, of such person; unless a contrary intention appears by the testament, by reason of an estate tail being devised to such person, or otherwise. But this rule does not apply to cases where these words import if no issue described in a preceding gift be born, or if there are no issue who obtain a vested estate by a preceding gift to such issue.

Wills Act, 1837, s. 29.

[Before the Act, a devisee in such cases took an estate tail with a remainder over. Now he takes an estate in fee simple with an executory limitation over if he leaves no issue at his death. Such executory limitation over, as well as a similar limitation after a bequest of leaseholds, if taking effect since 1882, will be void so soon as any issue of the class on whose failure the limitation over is to take effect attain twenty-one (Conveyancing Act, 1882, s. 10). The rule stated in the text has long applied to bequests of personalty, including leaseholds (*Target* v. *Gaunt* (1718) 1 P. Wms. 432; *Forth* v. *Chapman* (1720) *ibid.*, 663).]

Presumption that gifts confined to legitimate relations

2014. When there is a devise or bequest to children or other relations, only those who are legitimate can take;[a] unless the words of the testament,[b] or the circumstances under which the testator made the gift,[c] show that he meant to benefit persons who are illegitimate.

(a) *Wilkinson* v. *Adam* (1813) 1 V. & B., at p. 462.
(b) *Ibid.*, at p. 447.
(c) *Woodhouselee* v. *Dalrymple* (1817) 2 Mer. 419.
In re Eve [1909] 1 Ch. 796.

[Where the person to whose 'children' there is a gift, even of English real estate, was domiciled at the time of his marriage in a country by the law of which his *ante-nati* became legitimate by his marriage, such *ante-nati* can take under the gift (*Re Grey's Trusts* [1892] 3 Ch. 88).]

Presumption against double legacies

2015. If a testator has twice bequeathed a legacy to the same person, and there is no evidence on the face of the testament as to whether he intended the later legacy to be a substitute for or an addition to the prior legacy, the later legacy is presumed to be a substitute for the prior legacy:—

(i) if the same specific object is bequeathed, either in the same testament or in the testament and a codicil thereto; *or*

Suisse v. *Lowther* (1843) 2 Ha., at p. 432.

(ii) if two pecuniary legacies of equal amount are bequeathed in the same instrument; *or*

Manning v. *Thesiger* (1835) 3 My. & K. 29.

(iii) if two pecuniary legacies of equal amount are bequeathed in different instruments for the same reason.

Hurst v. *Beach* (1819) 5 Madd., at p. 358.

Presumption in favour of double legacies

2016. If a testator has twice bequeathed a legacy to the same person, and there is no evidence on the face of the testament as to whether he intended the later legacy to be a substitute for or an addition to the prior legacy, the later legacy is presumed to be an addition to the prior legacy:—

(i) if two pecuniary legacies of unequal amount are bequeathed in the same or in different instruments; *or*

Yockney v. *Hansard* (1844) 3 Ha., at p. 622, *per* Wigram, V. C.
Lee v. *Pain* (1845) 4 Ha., at p. 216.

(ii) if two pecuniary legacies, of equal amount, are bequeathed by different instruments without the same reason being given for both.

Hurst v. *Beach*, *ubi sup.*
Lee v. *Pain*, *ubi sup.*

Debtor legatee

2017. If a person who is entitled to a general legacy, a specific legacy of a sum of money, or a share of residue, owes a debt to the deceased which is immediately payable, neither he, nor any person claiming through him,[a] can claim what is due to him from the deceased's estate, until he has brought into account the sum which he owes to the deceased.[b] The fact that the debt is statute-barred will not prevent the application of this rule.[c]

(a) *Re Knapman* (1880) 18 Ch. D. 300.
(b) *Cherry* v. *Boultbee* (1839) 4 My. & Cr. 442.
Re Taylor [1894] 1 Ch. 671.
Re Abrahams [1908] 2 Ch. 69.

[But the rule does not apply where the beneficiary owes the debt solely in his capacity as executor for another person (*Re Bruce* [1908] 2 Ch. 682). The appointment of his debtor as executor was held at law to imply a release by the testator of the executor's debt (*Re Applebee* [1891] 3 Ch., at p. 429). But the equitable rule, that the matter is one of construction, is now followed; and the presumption is against an implied release, though, in accordance with the general principle, evidence to rebut the presumption will be admitted (*Re Applebee*, *ubi sup.*; *Re Pink* [1912] 1 Ch. 529).]

(c) *Courtenay* v. *Williams* (1844) 3 Ha. 539.
In re Akerman [1891] 3 Ch. 212.

[In this last case Kekewich, J., (pp. 217–8) expressly excepted *all* specific bequests from the operation of the rule.]

Debtor devisee

2018. The provisions of § 2017 have no application to an heir,[a] a devisee,[b] a specific legatee of leaseholds or chattels,[c] or a legatee whose legacy has been appropriated to him by the executor.[d]

(a) *In re Milnes* (1885) 53 L. T. 534.
(b) *In re Akerman* [1891] 3 Ch. 212.
(c) *In re Akerman, ubi sup.*
In re Taylor [1894] 1 Ch. 671.
(d) *Ballard* v. *Marsden* (1880) 14 Ch. D. 374.

[An appropriation of a legacy is a setting aside by the executor, with the consent of the legatee, of a specific part of the testator's estate to satisfy a pecuniary legacy. As to this, see *post*, Sect. III, Tit. VII.]

Beneficiary causing testator's death

2019. A person proved to have caused the death of the testator by an act which is a criminal offence cannot claim any benefit under the testament.

Cleaver v. *Mutual Reserve Fund Life Association* [1892] 1. Q. B. 147 (murder).
Estate of Crippen [1911] P., at p. 112 (murder).
Estate of Hall [1914] P. 1 (manslaughter).

[It has been judicially suggested in Canada that if the testament were made in favour of the criminal between commission of the criminal act and the death of the testator, the criminal could take (*Lundy* v. *Lundy* (1895) 24 Can. S. C., at p. 653). And the act of a lunatic is not a criminal offence for the purposes of the rule in the text (*Re Houghton* (1915) XXXI T. L. R. 427).]

Right to accept and reject

2020. Where there are two distinct gifts by the same testator to the same person, one onerous and the other beneficial, the donee may disclaim the onerous gift and take the beneficial; but if the onerous and the beneficial property are included in the same gift, the donee must, *primâ facie*, take the whole or none.

Re Baron Kensington [1902] 1 Ch., at p. 207, *per* Farwell, J.
Douglas Menzies v. *Umphelby* [1908] A. C. 224.

Gift of beneficiary's property

2021. If a testator gives to a devisee or legatee[a] any part of his (the testator's) own property, or makes a valid[b] disposition in his favour of property over which the testator has a power of appointment,[c] and also professes to give to another person property belonging at the time of the testator's death to the devisee, legatee, or appointee, the devisee, legatee, or appointee must elect whether he will take under the testament or against it[d] (see *post*, § 2022). The facts that the testator was ignorant that the property of which he was purporting to dispose belonged to the devisee, legatee, or appointee,[e] or that he did not intend to put the devisee, legatee, or appointee, to his election,[f] will not prevent the application of this rule; but the rule will not apply unless it is clear that the testator intended to dispose of property which in fact belonged to the devisee, legatee, or appointee, at the testator's death.[g]

(a) *Cooper* v. *Cooper* (1870) L. R. 6 Ch. App., at p. 21, *per* James, L. J.
(b) *In re Oliver's Settlement* [1905] 1 Ch. 191.
In re Nash [1910] 1 Ch., at pp. 10, 11.
(c) *Whistler* v. *Webster* (1794) 2 Ves. Jr. 367.
(d) *Ker* v. *Wauchope* (1819) 1 Bligh, at pp. 25, 26, *per* Lord Eldon, C.
(e) *Wollaston* v. *King* (1869) L. R. 8 Eq., at p. 173.
(f) *Cooper* v. *Cooper* (1874) L. R. 7 H. L., at p. 67.
(g) *Wintour* v. *Clifton* (1856) 8 De G. M. & G., at p. 650.

[The doctrine of Election arises chiefly in cases of dispositions by testament; but it may also arise under deeds and contracts (see *Codrington* v. *Lindsay* (1872) L. R. 8 Ch. App., at p. 587). To raise a case of election, it is necessary that the intended gift of A's property to B should be such that, if the property had belonged to the intending donor, the gift would have been valid (*Re Wright*

[1906] 2 Ch. 288, overruling *Re Bradshaw* [1902] 1 Ch. 436). And persons taking in default of valid appointment a share of a fund of which the appointor has appointed part to them under a limited power cannot be compelled to compensate, out of such part, the persons to whom the share was invalidly appointed; because such share was not the appointor's own property (*Bristow* v. *Warde* (1794) 2 Ves. Jr. 336). Finally, if a testator professes to give to A, property of which B has no power to dispose, no case of election will be thereby raised against B (*Re Lord Chesham* (1886) 31 Ch. D. 466).]

Election

2022. If the devisee, legatee, or appointee, elects to take under the testament, he must give up to the other beneficiary his own property which has been devised or bequeathed to such beneficiary.[a] If he elects to take against the testament, he must compensate the other beneficiary out of the property thereby devised, bequeathed, or appointed to himself.[b] The amount of the compensation is to be ascertained as at the testator's death.[c]

(a) *Gretton* v. *Haward* (1819) 1 Swanst., at p. 420.
(b) *Ibid.*, at p. 424.
Pickersgill v. *Rodger* (1877) 5 Ch. D., at p. 173, *per* Jessel, M. R.
(c) *Re Hancock* [1905] 1 Ch. 16.
Re Williams (1914) 110 L. T. 569.

[In order to give effect to these rules, the Court will order the beneficiary put to his election to convey his own property to the disappointed beneficiary, or will vest the property devised or bequeathed to the electing beneficiary in the disappointed beneficiary, as the case may be (see Seton, *Forms of Judgments* (7th ed.) II, pp. 1527, 1528).]

Terms of election

2023. A person put to his election is entitled to full information as to the value of the benefit con-

ferred on him by the testator.[a] He may be ordered by the Court to elect within a specified time; and, if he does not do so, he will be presumed to have elected to take against the testament.[b]

(a) *Whistler* v. *Webster* (1794) 2 Ves., at p. 371.
(b) *Gretton* v. *Haward* (1818) 1 Swanst., at pp. 447, 448.

Implied election

2024. An election for the purposes of § 2022 may be express; or it may be implied from acts done by the person required to make the election, if he knows that he has been put to his election.

Spread v. *Morgan* (1864–65) 11 H. L. C., at pp. 602, 613.

Persons under incapacity

2025. A married woman cannot be put to her election, if the effect would be that the exercise of such election might deprive her of property which she is restrained from alienating (*ante*, Bk. I, Sect. III, Tit. II, §§ 105–108).[a] A lunatic or a minor may be put to his election. But, in the case of a lunatic, the choice is made by his committee or quasi-committee, acting under the direction of the Court;[b] and, in the case of a minor, the Court will elect for him.[c]

(a) *Re Vardon's Trusts* (1885) 31 Ch. D. 275.

[It has been held (*Haynes* v. *Foster* [1901] 1 Ch. 361) that this rule applies even where an attempted restraint is not operative; e. g. because the woman has not yet married, or has ceased to be married. But the most recent decisions are against this view (*Re Tongue* [1915] 1 Ch. 390; *Re Hargrove*, *ibid.*, 398).]

(b) Lunacy Act, 1908, s. 1.
Re Earl of Sefton [1898] 2 Ch. 378.
(c) *Re Montagu* [1896] 1 Ch., at p. 552.

Satisfaction of debts by legacies

2026. If a legacy is bequeathed to a creditor of the testator, of an amount equal to or greater than the debt due from the testator, there is a presumption that the legacy is intended by the testator to satisfy the debt; and the creditor will be bound to elect whether he will claim the debt or the legacy.[a] But this presumption does not arise — (i) if a declaration to the contrary appears in the testament;[b] *or* (ii) if the debt is incurred after the execution of the testament;[c] *or* (iii) if the legacy is of less amount than the debt,[d] or of an uncertain amount;[e] *or* (iv) if the legacy is payable at a later period than the debt,[f] or is contingent;[g] *or* (v) if there is a direction in the testament that the testator's debts shall be paid.[h] And the presumption does not arise when a testator devises real estate to a creditor.[i]

(a) *Talbot* v. *Duke of Shrewsbury* (1714) Prec. Ch. 394.
Barret v. *Beckford* (1750) 1 Ves. Sen. 519.
Williamson v. *Naylor* (1834) 3 Y. & Coll. Exch., at p. 210 n.
(b) *Wallace* v. *Pomfret* (1805) 11 Ves. 542.
(c) *Thomas* v. *Bennet* (1725) 2 P. Wms., at p. 343.
(d) *Thynne* v. *Glengall* (1848) 2 H. L. C., at p. 153.
(e) *Ibid.*, at p. 154.
(f) *In re Horlock* [1895] 1 Ch. 516.

[But in favour of the presumption a general legacy to a creditor will be deemed to be payable at the testator's decease; unless a contrary intention appears by the will (*Re Rattenbury* [1906] 1 Ch. 667).]

(g) *Crichton* v. *Crichton* [1895] 2 Ch. 853.
(h) *Richardson* v. *Greese* (1743) 3 Atk. 65.
Re Huish (1889) 43 Ch. D. 260.
(i) *Eastwood* v. *Vinke* (1731) 2 P. Wms. 613.

[It is probable also that the presumption does not arise in the case of a legacy of a specific chattel; but there appears to be no decision on the point.]

Ademption of portions legacies

2027. If a father, or other person who has placed himself *in loco parentis* to a child,[a] gives by his testament a legacy or share of residue by way of portion to such child[a] and, subsequently, during his lifetime, advances or covenants to advance a portion[b] to or for the benefit of such child, whether or not of an amount equal to the testamentary provision, and whether or not it is settled in the same way, there is a presumption that the testamentary gift is adeemed, (i. e. revoked), wholly or *pro tanto*;[c] and, in the case of a covenant to advance a portion, this presumption is not rebutted merely by a direction in the testament that the testator's debts shall be paid.[d]

(a) *Ex parte Pye* (1811) 18 Ves. 140.
Montefiore v. *Guedalla* (1859) 1 De G. F. & J. 93.
In re Ashton [1897] 2 Ch., at p. 577–8. (If it is contended that the mother is *in loco parentis* for the purposes of this presumption, the burden of proof is on those who put forward the contention (*ibid.*, at p. 578).)

[A devise of real estate is not a portion for this purpose (*Davys* v. *Boucher* (1839) 3 Y. & Coll. Exch. 397).]

(b) *Taylor* v. *Taylor* (1875) L. R. 20 Eq. 155.
Re Scott [1903] 1 Ch. 1.

[These two cases show that a payment made by a father to a child is not a portion unless it is made to establish the child per-

manently in life. But a legacy given by a father is, *primâ facie*, a portion (*Ex parte Pye, ubi sup.*, at p. 153).]

(c) *Ex parte Pye, ubi sup.*
Durham v. *Wharton* (1836) 3 Cl. & Fin., at pp. 154–6.
Pym v. *Lockyer* (1841) 5 My. & Cr. 29.
Hopwood v. *Hopwood* (1859) 7 H. L. C., at p. 747.

[The rule applies equally to testamentary appointments (*Re Peel's Settlement* [1911] 2 Ch. 164).]

(d) *Cooper* v. *Macdonald* (1873) L. R. 16 Eq., at pp. 267, 268.

[In the case of portions-legacies, the claim of ademption can only be raised in favour of other persons to whom the testator stood *in loco parentis* (*Re Heather* [1906] 2 Ch. 230).]

Satisfaction of portions

2028. If a father, or other person who has placed himself *in loco parentis* to a child, has charged land with a portion for such child,[a] or has covenanted to give a portion to a child,[b] and subsequently advances a portion to such child during his lifetime,[c] or bequeaths a portion by his testament,[d] there is a presumption that the later gift was intended to satisfy the obligation previously incurred, either wholly or *pro tanto;* and the child must elect between the enforcement of his rights under the obligation, and his rights under the later gift.[e] But a devise will not satisfy an obligation to pay money, and a legacy will not satisfy an obligation to transfer land;[f] and a clear direction in the testament that the testator's debts are to be paid will rebut the presumption of satisfaction.[g]

(a) *Jesson* v. *Jesson* (1691) 2 Vern. 256.
(b) *Thynne* v. *Glengall* (1848) 2 H. L. C. 131.
In re Lawes (1881) 20 Ch. D. 81.

(c) *Jesson* v. *Jesson, ubi sup.*
(d) *Copley* v. *Copley* (1711) 1 P. Wms. 147.
Onslow v. *Michell* (1812) 18 Ves. 490.

[It is otherwise if the legacy is obviously not intended as a portion (see *Cooper* v. *Cooper* (1873) L. R. 8 Ch. App. 813). Slight differences of limitation of the two provisions will not, but substantial differences will, rebut the presumption (*Tussaud* v. *Tussaud* (1878) 9 Ch. D. 363).]

(e) *Thynne* v. *Glengall* (1848) 2 H. L. C. 131.
Chichester v. *Coventry* (1867) L. R. 2 H. L. 71.
(f) *Bellasis* v. *Uthwatt* (1737) West, *temp.* Hardwicke, at p. 281.
Chichester v. *Coventry, ubi sup.*, at p. 96.
(g) *Chichester* v. *Coventry, ubi sup.*, at p. 85.
Montagu v. *Earl of Sandwich* (1886) 32 Ch. D. 525.

[A person not being a direct beneficiary of the testator's bounty will not be bound by the doctrine; even though, indirectly, he gets the advantage of the double provision (*Re Blundell* [1906] 2 Ch. 222).]

Evidence to rebut presumption

2029. When the presumptions of ademption or satisfaction specified in §§ 2026–2028 are raised, the Court will admit parol evidence of the testator's intentions in order to rebut or maintain them.[a] Parol evidence of words or conduct contemporaneous with a transaction not evidenced by writing may also be admitted to prove the intention of the parties to it.[b]

(a) *Kirk* v. *Eddowes* (1844) 3 Ha., at pp. 516–7.
Re Shields [1912] 1 Ch. 591.
(b) *Kirk* v. *Eddowes, ubi sup.*, at p. 516, *per* Shadwell, V. C.

Ademption of non-portions legacies

2030. A legacy bequeathed to a legatee to whom the testator is neither a father nor *in loco parentis* is

not presumed to be adeemed by a subsequent advance to such legatee by the testator; unless both the legacy and the advance were given for the same specified purpose, or to fulfil the same moral obligation, or the intention that the advance should adeem the legacy otherwise appears.[a] Evidence of the circumstances under which the advance was made, and of contemporaneous declarations by the testator, is admissible to establish or rebut the presumption.[b]

(a) *Pankhurst* v. *Howell* (1870) L. R. 6 Ch. App., at pp. 137–138, *per* James, L. J.
Re Fletcher (1888) 38 Ch. D. 373.
(b) *Re Pollock* (1885) 28 Ch. D., at p. 556, *per* Lord Selborne.

Gifts to executors

2031. If a legacy or (?) a devise is given or made to an executor, it is presumed that the gift is made to him as a condition of his acting as executor; and he will not be entitled to it if he fails to act as executor.[a] But this presumption may be rebutted by the express terms of the testament, by expressions used in the testament indicating that the gift is not made to the executor on that condition,[b] or by parol evidence.[c] And the presumption does not apply to a gift of residue,[d] or of a reversionary interest.[e]

(a) *In re Appleton* (1885) 29 Ch. D. 893.
(b) *Compton* v. *Bloxham* (1845) 2 Coll. 201.
Re Denby (1861) 3 De G. F. & J. 350.
Jewis v. *Lawrence* (1869) L. R. 8 Eq. 345.
(c) *In re Appleton, ubi sup.*, at p. 895, *per* Cotton, L. J.
(d) *Griffiths* v. *Pruen* (1840) 11 Sim. 202.
(e) *In re Reeves Trusts* (1877) 4 Ch. D. 841.

Class gifts

2032. A devise or a legacy to a number of persons will be interpreted as a gift to a class, if (i) these persons are included under some general description,[a] *and* (ii) it appears that the testator intends to benefit the body of persons as a whole rather than the individuals belonging to it.[b]

(a) *Kingsbury* v. *Walter* [1901] A. C., at p. 192, *per* Lord Davey.
(b) *Ibid.*, at p. 191, *per* Lord Macnaghten.

[Where there is a legacy to a class, the constitution of which is to be ascertained by reference to the Statutes of Distribution, the shares of the members of the class are also to be ascertained in accordance with the Statutes; unless a contrary intention appears in the testament (*Bullock* v. *Downes* (1860) 9 H. L. C. 1; *In re Nightingale* [1909] 1 Ch. 385).]

Date for determination of class

2033. A gift to a class is, *primâ facie*, a gift to the members of the class existing at the testator's death, if any such are then in existence.[a] If none are then in existence, it is *primâ facie* a gift to all the members of the class who shall come into existence; and, till some of them come into existence, the income of the fund falls into residue.[b]

(a) *Viner* v. *Francis* (1789) 2 Cox, 190.
Mortimore v. *Mortimore* (1879) L. R. 4 App. Ca. 448.
In re Powell [1898] 1 Ch. 227.

[If a testator makes a gift to his next of kin who shall be living at a specified date, the class is ascertained at the testator's death; but only those next of kin who survive the specified date can take (*In re Winn* [1910] 1 Ch., at pp. 288, 289). If the gift (whether of capital or income) is made payable to the members of the class on the attainment of a certain age or marriage, the class (in the absence of indications in the testament of a contrary intention) remains open till the first member of the class attains this age or marries (*Andrews* v. *Partington*

(1791) 3 Bro. C. C. 401; *Re Stephens* [1904] 1 Ch. 322, criticizing *Re Wenmoth's Estate* (1887) 37 Ch. D. 266), or until it is necessary to divide the fund (*Re Faux* (1915) XXXI T. L. R. 289).]

(b) *Harris* v. *Lloyd* (1823) 1 Turn. & Russ. 310.

[If in a gift to the children of X the testator names a definite number of such children, and such number is incorrect, the mistake will be disregarded; and all the children existing at the date of the testament will take (*In re Groom* [1897] 2 Ch. 407).]

Lapse

2034. Subject to §§ 2035, 2036, 2038, and 2039, *post*, a devise, legacy, or appointment by testament or codicil lapses if the devisee, legatee, or appointee predeceases the testator.

Bl. *Comm.* II, 513.
Oke v. *Heath* (1748) 1 Ves. Sen., at p. 139.

Gifts to issue of testator

2035. A devise, legacy, or appointment by testament or codicil made in the exercise of a power of appointment which may be exercised in any manner which the testator may think proper, to a child or other issue of the testator, of an interest in real or personal property not determinable at or before the death of such child or other issue, does not lapse, if the child or other issue predeceases the testator leaving issue, and any of such issue are living at the death of the testator; but it devolves as if the child or other issue had died immediately after the testator, unless a contrary intention appears by the testament.

Wills Act, 1837, ss. 27 and 33.
Holyland v. *Lewin* (1884) 26 Ch. D., at p. 272.
Re Scott [1901] 1 K. B. 228.

[The issue living at the death of the testator need not have been living at the death of the beneficiary (*Goods of Parker* (1860) 1 Sw. & Tr. 523). But this § does not apply to appointments made in the exercise of special powers of appointment (*Holyland* v. *Lewin*, *ubi sup.*); nor does it apply to a gift to children or other issue as a class (*Re Sir E. Harvey's Estate* [1893] 1 Ch. 567). It follows from the wording of s. 33 of the Wills Act, that the surviving issue do not necessarily benefit by the bounty of the original testator, which may pass by the testament or other disposition of the original beneficiary, if appropriately worded (*Johnson* v. *Johnson* (1843) 3 Ha. 157; *Re Hone's Trusts* (1883) 22 Ch. D. 663).]

Joint testamentary gifts

2036. If there is a devise or a legacy to two or more persons jointly (*ante*, Bk. III, Sect. XVI, Tit. II, § 1751), and one or more of such persons predeceases the testator, the whole property comprised in the devise or legacy devolves (subject to § 2035, *ante*) on the testator's death to the survivor or survivors.

Morley v. *Bird* (1798) 3 Ves. 628.

Testamentary gifts in common

2037. If there is a devise or a legacy to two or more persons in common (*ante*, Bk. III, Sect. XVI, Tit. III, § 1759), and one or more of such persons predeceases the testator, his or their share will (subject to § 2035, *ante*) lapse;[(a)] unless (i) the testator has indicated an intention that the survivor or survivors shall take such share,[(b)] or (ii) the devise or legacy has been given to the beneficiaries as a class.[(c)]

(a) *Baxter* v. *Losh* (1851) 14 Beav. 612.
(b) *Mackinnon* v. *Peach* (1838) 2 Keen, 555.

[Whether the survivor or survivors in such a case take not only the original shares of a deceased co-owner, but also any shares accrued to him by reason of the prior decease of another co-owner, is a question to be decided upon the construction of the testament as a whole. Unless the Court can see some indication of an intention that accrued shares shall accrue as well as the original shares, only the original shares will accrue (*Ex parte West* (1784) 1 Bro. C. C. 575; *Goodwin* v. *Finlayson* (1850) 25 Beav. 65; *Dutton* v. *Crowdy* (1863) 33 Beav. 272).]

(c) *Fell* v. *Biddolph* (1875) L. R. 10 C. P. 701.
In re Coleman (1876) 4 Ch. D. 165
In re Jackson (1883) 25 Ch. D. 162.

Devises of estates tail

2038. If a devise has been made to a devisee for an estate tail, or an estate in quasi-entail, and the devisee predeceases the testator, leaving issue who survive the testator and are inheritable under the entail, the devise does not lapse, but takes effect as if the devisee had died immediately after the testator; unless a contrary intention appears by the testament.

Wills Act, 1837, s. 32.

[By 'inheritable' issue is, presumably, meant issue capable of inheriting. In the case provided for by this §, the issue must necessarily benefit by the devise; because the original devisee cannot affect the estate by his testament.]

Gifts to fulfil moral obligations

2039. If a testator, when he gave a legacy or made a devise, intended to discharge a moral obligation, whether legally binding or not, and if that obligation still exists at the testator's death, the death of the legatee or devisee before the testator will not cause the legacy to lapse.

Philips v. *Philips* (1844) 3 Ha. 281.
Re Sowerby (1856) 2 K. & J. 630.
Stevens v. *King* [1904] 2 Ch. 30.

[The cases all refer to legacies or testamentary appointments of personalty; but there seems no reason why the same principle should not apply to a devise. Where the doctrine applies, the property bequeathed or devised goes to the representatives of the original legatee or devisee, as part of the latter's assets (*Stevens* v. *King*, *ubi sup.*).]

Donatio mortis causâ

2040. A person who is suffering from illness may make a *donatio mortis causâ* in contemplation of his death through the illness from which he is suffering;[a] and it is not necessary, in order to render the gift effectual, that he should believe that he will die of such illness.[b] He cannot make such a gift in contemplation of suicide.[c]

(a) *Duffield* v. *Elwes* (1827) 1 Bligh, N. S., 497.
Staniland v. *Willott* (1852) 3 Mac. & G. 664.
Cain v. *Moon* [1896] 2 Q. B., at p. 286.
(b) *Cain* v. *Moon*, *ubi sup.*, at p. 286.
(c) *Agnew* v. *Belfast Banking Co.* [1896] 2 Ir. R. 204.

[*Quære*: can a good *donatio mortis causâ* be made in view of the donor's death through a contemplated accident, as distinct from an illness?]

Intention of gift

2041. In every *donatio mortis causâ* there must be an intention to make an immediate gift,[a] subject to the conditions (i) that the title to the property given shall not pass absolutely to the donee till the death of the donor,[b] and (ii) that, if the donor resumes

possession of the subject-matter of the gift,[c] or recovers from the illness in contemplation of which the gift was made,[d] the gift shall be void. In the last case, the donee till re-delivery holds the property as trustee for the donor.[e]

(a) *In re Patterson's Estate* (1864) 4 De G. J. & S. 422.
(b) *Tate* v. *Hilbert* (1793) 2 Ves. Jr., at p. 119.
(c) *Bunn* v. *Markham* (1816) 7 Taunt., at pp. 231, 232, *per* Gibbs, C. J. *Cant* v. *Gregory* (1894) X T. L. R. 584.
(d) *Tate* v. *Leithead* (1854) Kay, at p. 662.
(e) *Staniland* v. *Willott* (1852) 2 Mac. & G. 664.

Necessity for delivery

2042. A *donatio mortis causâ* will not be valid until the subject-matter of the gift is actually delivered by the donor[a] or his agent[b] to the donee or his agent,[c] with intent to pass the ownership.[d] A bailment to the donee, followed subsequently by a statement that the thing bailed is to be the property of the donee in the case of donor's death through the illness from which he is suffering, is a sufficient delivery for this purpose.[e]

(a) *Ward* v. *Turner* (1752) 2 Ves. Sen., at p. 442. *Re Wasserberg* [1915] 1 Ch. 915.
(b) *Miller* v. *Miller* (1735) 3 P. Wms. 356. *In re Beaumont* [1902] 1 Ch., at p. 896.
(c) *Farquharson* v. *Cave* (1846) 2 Coll., at pp. 367, 368.
(d) *Solicitor to the Treasury* v. *Lewis* [1900] 2 Ch. 812.
(e) *Cain* v. *Moon* [1896] 2 Q. B. 238.

[A delivery which, though it does not pass the property, evinces unmistakeably the intention of the donor to pass the property to the donee, entitles the latter to apply to a Court of Equity to complete the gift (*Duffield* v. *Elwes* (1827) 1 Bligh, N. S., at pp. 543–4; *Re Dillon* (1890) 44 Ch. D., at p. 83, *per* Lindley, L. J.).]

Gifts of choses in action

2043. A chose in action may be the subject of a *donatio mortis causâ*. If the chose in action is a negotiable instrument, its delivery to the donee will be sufficient for the purposes of § 2042;[a] even though it is payable to order and not indorsed.[b] If the chose in action is not embodied in a negotiable instrument, the delivery of a document which acknowledges the receipt of a sum of money payable to the donor, expresses the terms on which it is payable, and shows what is the contract between the donor and the party liable to him, will be sufficient.[c]

(a) *Miller* v. *Miller* (1735) 3 P. Wms. 356 (bank notes).
(b) *In re Mead* (1880) 15 Ch. D. 651 (bills of exchange).
Veal v. *Veal* (1859) 27 Beav. 303 (promissory notes).
Rolls v. *Pearce* (1877) 5 Ch. D. 730.
Clement v. *Cheesman* (1884) 27 Ch. D. 631.
Re Beaumont [1902] 1 Ch., at pp. 895, 897.
(cheque of a third party or cheque of the donor actually negotiated)
(c) *In re Dillon* (1890) 44 Ch. D., at p. 82.
In re Weston [1902] 1 Ch., at p. 685.

[The following documents have been held to comply with this test: — bankers' deposit notes (*Re Dillon*, *ubi sup.*; *Hudson* v. *Spencer* [1910] 2 Ch. 285); bonds (*Snellgrove* v. *Baily* (1744) 3 Atk. 214); mortgage deeds (*Duffield* v. *Elwes* (1827) 1 Bligh, N. S. 497); policies of insurance (*Amis* v. *Witt* (1863) 33 Beav. 619); Post Office Savings Bank books, as to the cash deposits therein contained (*In re Weston* [1902] 1 Ch. 680; *In re Andrews* [1902] 2 Ch. 394); bonds payable to bearer (*Re Wasserberg* [1915] 1 Ch. 195). On the other hand, the delivery of a receipt is not sufficient (*Moore* v. *Darton* (1851) 4 De G. & Sm., at p. 530), unless the document is more than a receipt, and contains the terms of the contract (*ibid.*). Similarly, the delivery of an I. O. U. is not sufficient (*Duckworth* v. *Lee* [1899] 1 I. R. 405).]

Delivery of evidences of title

2044. When the delivery of a document does not, either at law or in equity, pass the property in the chose in action evidenced by it,[a] or when a document is merely an authority given by the donor which is revocable by his death,[b] its delivery to a donee will not be sufficient for the purposes of § 2042, *ante*.

(a) *Ward* v. *Turner* (1752) 2 Ves. Sen. 431 (receipts for South Sea annuities).
Moore v. *Moore* (1874) L. R. 18 Eq. 474 (certificates of railway stock).
In re Weston [1902] 1 Ch. 680 (certificates of Building Society shares).
In re Andrews [1902] 2 Ch. 394 (certificate of investment in government stock).

(b) *Hewitt* v. *Kaye* (1868) L. R. 6 Eq. 198. } (cheques drawn by donor
In re Beak's Estate (1872) L. R. 13 Eq. 489. } and not presented in his lifetime)
Re Mead (1880) 15 C. D. 651 (cheque to withdraw deposit).
In re Beaumont [1902] 1 Ch. 889 (cheque drawn by deceased on his account which was overdrawn, and not paid before his death).

[The question whether a valid *donatio mortis causâ* is made by the delivery of any given document, which either creates or evidences a chose in action, is difficult, because, in recognizing or refusing to recognize such delivery as effectual for this purpose, the Courts have not followed any one principle. The principles upon which the Courts have recognized delivery as effectual, are set out in § 2043; and the vagueness of the test applied to non-negotiable choses in action obviously leaves a good deal of uncertainty, in the case of any given document which has not been adjudicated upon by the Courts. The principles upon which the Courts have refused to recognize delivery as effectual are dealt with in § 2044. They seem to be (i) that, if a particular mode of transfer is prescribed by law, nothing but that mode can have any effect at law or in equity; (ii) that a mere authority to pay (even though embodied in a document, such as a cheque drawn by the donor on his bank) is not a chose in action which admits of transfer, because the authority is revoked by the donor's death. Of course, if a cheque comes into

the hands of a third party who is a holder in due course, it is a negotiable instrument, and is governed by the rules applicable to such an instrument.]

Donatio mortis causâ on trust

2045. A *donatio mortis causâ* may be made to the donee as trustee for another person, or for the carrying out of particular purposes.

Blount v. *Burrow* (1792) 4 Bro. C. C., at p. 75.
Hills v. *Hills* (1841) 8 M. & W. 401.

Does not pass to personal representative of owner

2046. The death of the donor of a *donatio mortis causâ* does not vest the property in the subject-matter of such gift in his representative, but perfects the title of the donee;[a] and no assent on the part of the representative is required to complete the gift.[b] But the property given may be taken to pay the creditors of the deceased, in the event of a deficiency of the donor's assets.[c]

(a) *Tate* v. *Hilbert* (1793) 2 Ves., at p. 120.
(b) *Ibid.*
(c) *Tate* v. *Leithead* (1852) Kay, at p. 659.

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